1931 *Present:* **Macdonell C.J.**

GUNESEKERE *v.* AHAMATH.

532—P. C. Colombo, 12,102.

Maintenance—Order in favour of child on application of the mother—Death of mother—Application renewed by uncle—Order of arrears—Child without means of support—Ordinance No. 19 of 1889, s. 3.

An order for maintenance was passed against the respondent in favour of a child on the application of the mother. After the death of the mother, the order was renewed on the application of the present applicant, the mother's brother, who had maintained the child in the interval.

Held (on an application for payment of arrears of maintenance) that the child cannot be prevented from obtaining an order for maintenance from its father or from obtaining arrears under a subsisting order, merely because it was maintained by the charity of a third person.

APPEAL from an order for maintenance made by the Police Magistrate of Colombo.

Rajapakse, for applicant, respondent, took a preliminary objection that no right of appeal lay. See *Mariapillai v. Savarimuttu.*[1] Appeal lies only under section 17 of Ordinance No. 19 of 1889. This is not an order under section 3 or 14 but an order under section 12.

Weerasooria, for defendant, appellant.—Even if no appeal lies, the Supreme Court can deal with the case by way of revision. No prejudice caused to respondent, if the appeal is regarded as an application for revision.

The original parties to the case were the applicant (mother) and defendant. The order was made in favour of the applicant. Applicant died in 1927 and the order ceased then. No procedure in the order for the substitution of any other party in place of the applicant (mother). A fresh application has to be made by any person on behalf of the child under section 3 of the Ordinance. This substitution is in effect such a new application. Therefore, no arrears for past maintenance of the child can be claimed. (*Ranasinghe v. Peiris*[2].) In English law, section 5 of the Poor Law Amendment Act of 1844[3] refers to the death of the applicant and the appointment of some one to have custody of child and receive the maintenance. A note to the section in *Halsbury* states " the words in the section seem to exclude a power to recover arrears accruing, due before the appointment ". (*2 Hals. 442, s. 753, note K.*) If a wife or child comes to Court to claim arrears, the presumption is that she or it maintained herself or itself out of their private means. See *Ranasinghe v. Peiris* (*supra*), *p. 23* and *25*.

Rajapakse, for applicant, respondent.—Exercise of revisionary powers is discretionary. Supreme Court will not interfere in revision, unless order is manifestly unjust (*Hamid v. Alvares*[4]).

[1] *14 N. L. R. 244.*
[2] *13 N. L. R. 21.*
[3] *7 & 8 Vict. c. 101.*
[4] *4 C. W. R. 250.*

Real parties to the original order are the child and the defendant. Mother is merely the agent or representative of the child to draw maintenance due to it. The adjudication by the Court was that the defendant is the father and that he should pay an amount monthly for the child (section 3 of Ordinance No. 19 of 1889). Death of mother makes no difference and another person may be appointed to represent the child and draw the moneys on its behalf. The order under section 3 of the Ordinance is valid against the defendant unless such order is set aside or varied or becomes ineffective under section 6 or section 10 or section 8. All we ask is that this valid order be enforced. The principle that arrears for past maintenance are not recoverable is applicable to the period before the parties come into Court. *Ranasinghe v. Peiris* (*supra*) refers to such a period, and in particular held that under the Common law—apart from the Maintenance Ordinance of 1889—no action lies to recover past maintenance prior to the date of coming into Court. It has been held that arrears of past maintenance are recoverable from the date of the grant of maintenance by order of Court, on the footing that it is merely an enforcement of the order or decree of a Court. (*Valliammai v. Sanmugam*[1].)

Section 5 of the Poor Law Act is different from our law and the note to *2 Hals. 442, s. 753* is explainable on the footing that the person appointed, not having expended any moneys on the bastard before his appointment, is therefore not entitled to recover the arrears. The note is not justified in any other sense. To permit a presumption as suggested in *13 N. L. R. 23 and 25* is to permit the defendant to take advantage of his own default.

Sohoni's *Criminal Procedure Code, 2nd ed., p. 1195, s. 71*, says that the grant of arrears of maintenance is discretionary in Police Magistrate. If so, the Appeal Court will not interfere.

Counsel also referred to *1 Nathan, p. 107, note (1907 ed.)*.

September 9, 1931. MACDONELL C.J.—

In this case the appellant, respondent below, appeals against a maintenance order under section 3 of Ordinance No. 19 of 1889, under the following circumstances.

In May, 1922. the Magistrate made an order against the present appellant to pay Rs. 12.50 per mensem for the maintenance of his illegitimate child. The order was treated as being one to pay this amount into Court each month, and the mother of the child used to apply to the Court at intervals to take out the sums paid in by appellant under the order. But the order was clearly one in favour of, and for the maintenance of, the child. From the journal entries it appears that the present appellant paid the Rs. 12.50 per mensem regularly enough up to about the end of 1926, after which they ceased to be paid. In 1927 the mother of the child died and the present applicant, her brother, looked after and maintained with his own funds the child in whose favour the order had been made. On July 27, 1930, the present applicant, as has been said, the uncle of the child and brother of its deceased mother, applied to the Magistrate of the Court from which the order of May, 1922, had emanated

[1] *9 C. L. R. 161; and 203—P. C. Balapitiya, 6,520 of May 25, 1928.*

to be substituted for the child's mother, deceased, as the person to receive moneys payable under that order, and the Magistrate made order substituting him accordingly. Thereupon, the present appellant began again to pay into Court Rs. 12.50 per mensem under the order of May, 1922, and he does not, as I understand, dispute his liability to do so. But the applicant—the substituted applicant as one may call him—had applied to the Magistrate for payment of the arrears at Rs. 12.50 per mensem since the last payment under the order which had been made as has been said, about the end of 1926. On May 29, 1931, the Magistrate made the following order:—

"*Vide* order delivered. Substituted applicant to recover by execution all arrears up to October 31, 1930, in addition to dues thereafter. These moneys not to be paid to substituted applicant but to remain to the credit of child and if the substituted applicant wanted to draw from this fund he must submit a bill for consideration by Court." It is from the order just quoted that the present appeal is brought. As a preliminary point, it was argued that this not being an appeal against an order made under section 3 or section 14 of the Ordinance, the present application to the Court would not lie as an appeal, though, at the same time, it was conceded that the Court could revise the Magistrate's order of May 29, 1931, under its powers of revision (*Mariapillai v. Savarimuttu*[1] and *Isabelahamy v. Perera*[2]). As at present advised, I prefer to deal with this application as one in revision, and not as an appeal.

Full and careful argument was addressed to me on this application, but I do not think that the order of the learned Magistrate should be interfered with. He had before him a valid order, that of May, 1922, in favour of the child. I emphasize these last words, since it was argued that the original order of May, 1922, was one in favour of the then applicant, the mother, and that the order now under review is one in favour of the substituted applicant, that therefore it is not the original order but a different and new one which the Magistrate had no power to make. I do not think so. The person in whose favour the order of May, 1922, was made was the child. There may now be a different person to be responsible for the expenditure of the money paid or to be paid under the order whether we call that person agent or curator or trustee, but the person in whose favour the order was made was the child; were it not so, it might be argued that whenever an order is made for so much per mensem for maintenance of a child but such money to be received and expended by someone else, this is an order in favour not of the child but of that somebody else. If the order of May, 1922, was in favour of the child, then the order of the Magistrate now under revision is simply a direction with regard to a subsisting order, and not a new or different order.

The right to recover arrears on a subsisting order under section 3 of the Ordinance seems undoubted (*Valliammai v. Sammugan*[3]). See also *de Silva v. Fernando*[4]. Here the substituted applicant is asking for

[1] *14 N. L. R. 244.*
[2] *3 C. W. R. 294.*
[3] *9 C. L. R. 161.*
[4] *32 N. L. R. 71.*

arrears due under a subsisting order, and on the authority of the case in *9 C. L. R. 161*, with which decision I respectfully concur; I see no answer to his claim.

The order is a subsisting order, and this distinguishes the present matter from the point raised and decided in *Ranansinghe v. Peiris* [1]. That was an action not under the Ordinance No. 19 of 1889 but at Common law, not to recover anything due under a subsisting order but to establish a right to maintenance for certain years past and to recover maintenance for those years past. The Court (Middleton A.C.J. and Pereira J.) held the action not maintainable, but it will be seen that the facts in that case are quite different from those in the present matter. Apart from that case not being a proceeding under the Ordinance at all, it was not an action for arrears of maintenance which had accrued due from time to time under a subsisting order of Court but an action to establish the fact that maintenance was due and demandable during a certain past period and then to obtain an order for payment of that maintenance, liability to pay which had now for the first time been established. I would quote from Pereira J. in that case at page 25:—

> " with regard to children, there is more distinct authority in the text-books. I need only refer to one of them. Van Leeuwen lays down in the *Censura Forensis* (*1, 1, 10, 1*), and repeats later in his *Commentaries* (*1, 13, 1, 3, 7*), that to the obedience and filial respect which children owe to their parents corresponds the duty of parents to their children to afford a good education and such support as is compatible with their means to those children who cannot support themselves, and this duty they may be compelled to perform *nisi ex bonis suis adventitiis aut artificio aliquo ipsi semet alere possint.*
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> Thus, a father, he proceeds, is not bound to support a son who has learnt to support himself without assistance, or, as the saying is ' to float by his own cork '. From the above it is clear that a father is not bound to support his child who is supported by means of property derived from others or by some handicraft."

The words in Latin in the passage quoted from are from Van Leeuwen's *Censura Forensis*. The corresponding passages in his *Commentaries* (Book I, Chapter 13, Section 7) read in Kotze's English translation as follows:—

> " In return for the paternal power and the duty which the children owe their parents, there are the education and support due to the children from their parents, according to their means and condition in life, which may be lawfully required of them; except where the children are able to support themselves by some trade or handiwork, or some property has been derived or acquired by them from third parties, the fruits whereof may be expended towards their maintenance ",

practically to the same effect as the passage recited above from the *Censura Forensis*. But I do not think that either of these passages goes so far as to suggest that a child would be disabled from obtaining a maintenance order against its father or, as is the present matter, from obtaining arrears under a subsisting maintenance order against its

[1] *13 N. L. R. 21.*

father, because it was for the moment being, or had for the period, wholly, or in part, for which it asked the arrears been, maintained by the charity of a third person. Charity is not *bona sua adventitia* or something *ex artificio aliquo*, nor is it " property derived or acquired by the child from third parties ". Apparently in Roman-Dutch law the child must have means of support in its own right, either its own earnings or the income of property of its own, to enable the father to resist an application for its maintenance. For us, however, the point is decided by the words in section 3 of the Ordinance which talk of a child " unable to maintain itself ". I think these words are in agreement with the Common law as set out above. But in any case, whether these words in section 3 agree with the Common law or not, they are now the law on the matter, and a child which is dependent on charity cannot be said to be " able to maintain itself ". I have cited these passages and discussed this point at length because in the course of argument I may have used expressions not quite in harmony with those passages or with section 3 of the Ordinance.

I see no reason to think the order of the Magistrate wrong, and the application to revise it must be refused.

Appeal dismissed.