June 27, 1911

Present : Wood Renton J.

MARIAPILLAI *v.* SAVERIMUTTU.

375—*P. C. Jaffna,* 936.

Appeal—Cancellation of a previous order for maintenance—Order not appealable—Revision—Ordinance No. 19 of 1889, ss. 3, 10, 14, and 17.

No appeal lies against an order made under section 10 of Ordinance No. 19 of 1889 cancelling a previous order for maintenance. The propriety of such an order can be brought before the Supreme Court by way of revision.

THE appellant in this case appealed against an order made under section 10 of Ordinance No. 19 of 1889 cancelling a previous order for maintenance.

J. Joseph, for the respondent, took the preliminary objection that no appeal lay from the order complained of. The law regarding the right of appeal in maintenance cases is contained in section 17 of Ordinance No. 19 of 1889. This section gives a right of appeal only from orders made under sections 3 and 14 of the Ordinance. An order cancelling an order for maintenance is one which falls under section 6, and is therefore not appealable. Counsel cited *Punchohamy v. De Silva,*[1] *Fernando v. Iamperumal*[2].

Tisseveresinghe, for appellant.—Section 17 cannot be said to contain the whole law regarding appeals in maintenance cases. Lawrie J. dissented from the ruling in *Fernando v. Iamperumal*[2], and Bonser, C.J. held in *Eina v. Eraneris*[3] that Lawrie J. was right in his dissent. Counsel also referred to *Justina v. Arman* and *Perera v. Nonis,*[4] *Perera v. Podi Sinno,*[5] *Tissehamy v. Samuel Appu.*[6]

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The question raised by this appeal, at the stage which it has at present reached, may be shortly stated thus. The learned Police Magistrate at Jaffna has made an order, under section 10 of Ordinance No. 19 of 1889, cancelling a previous order for maintenance in favour of the appellant. There can be no doubt but that the propriety of that order can be brought before this Court by way of revision. But the question to be decided at present is whether or not it can be made the subject of an appeal On that point the authorities are as

[1] *(1898) 4 N. L. R. 194.*
[2] *(1892) 2 C. L. R. 88.*
[3] *(1900) 4 N. L. R. 4.*
[4] *(1909) 12 N. L. R. 263.*
[5] *(1901) 5 N. L. R. 243.*
[6] *(1902) 5 N. L. R. 334.*

follows. In *Fernando v. Iamperumal*,[1] it was held by the Full Court, as it was then constituted, that no appeal lies against the refusal of a Police Magistrate to make an order for maintenance under Ordinance No. 19 of 1889. It will be observed that that decision is posterior in point of time to section 39 of the Courts Ordinance, which confers on the Supreme Court its general powers of appellate jurisdiction. Of the three Judges by whom it was decided, however, one, Mr. Justice Lawrie, dissented. In the case of *Eina v. Eraneris*,[2] Sir John Bonser, C.J., referred *obiter* to the case of *Fernando v. Iamperumal*,[1] which he cited as *Selestina v. Perera*,[1] the second of two heads under which it is reported, and said that he thought the opinion of Mr. Justice Lawrie was clearly right. The only point to be decided in that case, however, was whether an appeal lies from an order dismissing an application for maintenance. In *Punchohamy v. De Silva*,[3] Mr. Justice Browne, following the case of *Fernando v. Iamperumal*,[1] by which he held himself to be bound, decided that no appeal lies from an order cancelling an order for maintenance under section 10 of Ordinance No. 19 of 1889. In *Perera v. Podi Singho*,[4] Chief Justice Bonser held that under section 3 of Ordinance No. 19 of 1889 the Magistrate may make two orders, an order for maintenance or an order dismissing the application, and that in either case the order may be appealed from, and he indicated that in his opinion the first decision above-mentioned was not an authority to be followed since, when the case, in regard to which Chief Justice Burnside and Mr. Justice Lawrie had already differed, came on for argument before the Full Court, counsel had agreed to take the decision of the Court without further argument. The case of *Tissehamy v. Samuel Appu*[5] was also a Full Court decision. It was there held that the order of a Magistrate who, after hearing evidence in a case of maintenance, declines to make an order for maintenance, is one that is appealable to the Supreme Court under section 17 of Ordinance No. 19 of 1889. In the cases of *Justina v. Arman* and *Perera v. Nonis*,[6] my brother Middleton and I declined to extend the principle of the decision in *Tissehamy v. Samuel Appu*[5] to applications for maintenance which had been dismissed otherwise than on the merits.

It will appear from the brief review that I have just given of the state of our case law on the subject, that the conclusion arrived at in *Fernando v. Iamperumal*[1] in 1892 has been held to be wrong only in cases coming under section 3 or section 14 of Ordinance No. 19 of 1889, both of which are expressly mentioned in section 17. I am not aware of any case in which it has been held that an appeal lay under section 10, and my own experience in Ceylon leads me to think that such cases have hitherto been dealt with in revision. Under these

[1] *(1892) 2 C. L. R. 88.*
[2] *(1900) 4 N. L. R. 4.*
[3] *(1898) 4 N. L. R. 194.*
[4] *(1901) 5 N. L. R. 243.*
[5] *(1902) 5 N. L. R. 334.*
[6] *(1909) 12 N. L. R. 263 ; 1 Cur. L. R. 120.*

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circumstances I am not prepared, sitting as a single Judge, to depart from that practice now, and I am all the less inclined to do so, because it is by no means clear to my mind that it is wrong. It must be remembered that Ordinance No. 19 of 1889 creates a special statutory procedure in maintenance cases. It is posterior in date to section 39 of the Courts Ordinance, and section 17 confers a right of appeal under it only in the case of persons who may be dissatisfied with orders made by a Police Magistrate under section 3 or under section 14. I think that it may fairly be argued that the effect of section 17, subject to the glosses which have been put upon it by the decisions above referred to, is to limit the right of appeal to cases that can be brought under section 3 or section 14, and there are reasons of substance which may justify such an interpretation of the law. We have already held, in a decision that is binding upon me, that it is still open to an applicant, here as in England, to renew her application in cases—I am here stating the Ceylon and not the English practice—where it has been dismissed otherwise than on the merits. The Full Court has held that a case where there has been an adjudication on the merits can be brought within the provisions of section 3, and therefore within those of section 17. Section 17 contains, however, no reference to section 10. In very many of the cases that may be decided under that section—cases turning upon modifications of rates of maintenance that have already been allowed—any mistake that may be made by the Court of first instance can be adequately dealt with in revision, and it would be inconvenient if a general right of appeal under section 10 were recognized. The case may be put down to be mentioned before me in revision.

After hearing counsel in revision, His Lordship affirmed the order appealed against.