

1957

Present: T. S. Fernando, J.

SOLOMON FERNANDO, Appellant, and PADMA
FERNANDO, Respondent

S. C. 466—M. C. Panadura (Addl.) 37,198

Maintenance—Refusal by Magistrate—Order set aside in appeal—Date from which allowance becomes payable—Maintenance Ordinance, ss. 2, 17—Criminal Procedure Code, ss. 347, 350.

Where, on appeal, a Magistrate's refusal of an application for maintenance is reversed and order is made by the Supreme Court allowing maintenance, maintenance becomes payable from the date when the Magistrate made order refusing the application:

APPPEAL from an order of the Magistrate's Court, Panadura.

S. P. C. Fernando, with *Stanley Perera*, for the defendant-appellant.

M. M. Kumarakulasingham, with *B. S. Dias*, for the applicant-respondent.

Cur. adv. vult.

December 13, 1957. T. S. FERNANDO, J.—

The applicant, the wife of the defendant, made an application to the Magistrate in terms of the Maintenance Ordinance on 10th November 1954 seeking maintenance for herself. By his order delivered on 10th September 1955 the Magistrate dismissed the application of the applicant. She appealed to this Court and was successful in obtaining a reversal of the Magistrate's order. The order of this Court delivered on 6th August 1956 fixed the allowance payable by the defendant to the applicant at Rs. 100 a month. The question that arises upon this appeal relates to the date from which maintenance becomes payable as a result of the order of this Court.

The learned Magistrate has held that maintenance is payable from 10th September 1955, the date the Magistrate made the order dismissing the application which was reversed by this Court. The defendant's counsel argues that maintenance is payable only from 6th August 1956, the date of the reversal of the Magistrate's order and the date on which the Supreme Court made its order directing the payment of maintenance.

The argument of counsel necessitates the examination of Section 2 of the Maintenance Ordinance and of Sections 347 and 350 of the Criminal Procedure Code. Section 2 of the Maintenance Ordinance is the provision of law which empowers the making of an order for maintenance. This section empowers a Magistrate to make such an order and provides that maintenance shall be payable from the date of the order. It will be observed that but for this statutory limitation it might have been competent for a Magistrate to direct that maintenance be payable from the date of the application itself.

A person dissatisfied with an order refusing maintenance has a right to appeal to this Court, and Section 17 of the Ordinance enacts that "Sections 338 to 352 of the Criminal Procedure Code shall apply to such appeal". Under Section 347 of the Criminal Procedure Code,

this Court is empowered on an appeal to alter or reverse an order of a Magistrate's Court, and it seems to me that when this Court made its order on 6th August 1956 it was acting in terms of Section 347, and that it reversed the Magistrate's order dismissing the application. This Court has no original jurisdiction in the matter of making an order for maintenance; its jurisdiction is purely appellate; and, in reversing the order dismissing the application and in directing payment of maintenance, this Court was doing no more than substituting for the Magistrate's order of 10th September 1955 an order for maintenance; in other words, this Court held that the Magistrate should on 10th September 1955 have made an order allowing maintenance. This Court's order now stands in the place of the Magistrate's order and should, in my opinion, take effect on the date on which the Magistrate's order would have taken effect if there had been an allowance by the Magistrate of the application.

Where a person has appealed against the allowance of an application for maintenance and this Court dismisses the appeal, it is beyond dispute that the date of the order under Section 2 of the Maintenance Ordinance is the date the Magistrate made the order. Where a person appeals against the quantum of maintenance and is successful in obtaining on appeal an increase or a reduction of the quantum, it is not possible to contend successfully that the date from which the order allowing the altered maintenance takes effect is any other than the date on which the Magistrate made the order. I am not convinced that a different result is obtained where, on appeal, a refusal of maintenance is reversed and in place of the order dismissing the application there is substituted an order allowing maintenance. What the Court of Appeal does is to ascertain what decision the Magistrate should correctly have reached in the premises and to direct that further action be taken in the case on the basis that the Magistrate has reached what it (the Court of Appeal) considers was the correct decision.

Had it not been for the express enactment to the contrary contained in Section 2 of the Maintenance Ordinance, it would have been possible to contend that an applicant is entitled to maintenance as from the date of neglect or refusal to maintain on the part of the person legally liable to do so. A court of law should be slow to give an interpretation to this expressed limitation of the operative date which would have the effect of placing an applicant for maintenance at a greater disadvantage than the strict meaning of the limitation demands.

Learned Counsel for the defendant drew attention to Section 350 (2) of the Criminal Procedure Code and contended that upon the receipt of the record back from the Supreme Court the Magistrate is required to make an order conformable to the Supreme Court's order, and that this order can only operate as from the date on which it is made by the Magistrate's Court. This contention would in normal circumstances render the operative date of the order for maintenance a date even subsequent to the date on which the Supreme Court delivered its order. I do not think it profitable to consider the nature of orders that may have to be

made by Magistrates in a ministerial capacity in compliance with judicial orders of the Supreme Court in hypothetical cases. It would suffice if I consider the order the Magistrate was called upon to make conformable to the order of this Court delivered on 6th August 1956. As this Court ordered the payment of maintenance and as this Court had no original jurisdiction to make such an order, what this Court did, as I have stated already, was to substitute for the Magistrate's order of 10th September 1955 its own order of 6th August 1956. The date from which this Court's order took effect therefore in my opinion related back to 10th September 1955, and that is the date from which the defendant has to pay maintenance. The Magistrate was therefore correct in directing that maintenance has to be paid from 10th September 1955.

I would dismiss the appeal with costs.

Appeal dismissed.

