1957 *Present :* L. W. de Silva, A.J.

KANAPATHIPILLAI, Appellant, *and* SORNAMMAH, Respondent

S. C. 106—M. C. Jaffna, 3,884

Maintenance Ordinance—Sections 2 and 8—Arrears due—Issue of distress warrant—Elements necessary.

Before a distress warrant can be issued for non-payment of maintenance, there must be a disclosure *inter alia* that (1) an order for maintenance had been duly made, and (2) such order specified a monthly sum.

In an application for maintenance made by a wife on behalf of herself and eight children who were between the ages of 15 and 3 years, the husband undertook to pay a composite sum of Rs. 75 every month to the wife for herself and five of the children. The settlement was recorded, but the Court made no order of any kind.

Held (in revision), (i) that the settlement, by itself, was not a valid order of maintenance within the meaning of section 2 of the Maintenance Ordinance.

(ii) that the composite sum could not connote any specified sum in favour of the wife for herself.

APPEAL from an order of the Magistrate's Court, Jaffna.

Colvin R. de Silva, with *V. Ratnasabapathy*, for defendant-appellant.

C. Ranganathan, with *M. Shanmugalingam*, for applicant-respondent.

Cur. adv. vult.

July 26, 1957. L. W. de SILVA, A.J.—

The appeal questions the legality of an order made by the Magistrate in issuing a warrant under section 8 of the Maintenance Ordinance (Cap. 76). Learned Counsel for the applicant-respondent took a preliminary objection to the hearing on the ground that no appeal lay from such an order. He relied on section 17 of the same enactment which

grants a right of appeal only in respect of orders made under sections 2 or 14. In support of the objection, the decisions reported in *14 N.L.R. 244, 4 B.N.C. 73, 5 C.L.J. 231* and *7 C.L.W. 94* were cited. Learned Counsel for the appellant questioned their applicability as well as their correctness but did not pursue the matter. Instead, he moved that I exercise the revisional powers vested in this Court. After hearing Counsel on both sides, I decided to act in Revision not only because the order appealed against is an illegality resulting from a want of jurisdiction, but also because that illegality, if permitted to stand, must by its very nature continue to operate to the detriment of the appellant until other circumstances warranting a cancellation or creating a cessation of the order arise.

In view of the erratic course this case has taken since 1956, it has become necessary to set out in detail the facts and circumstances. In October 1938 the respondent alleged that her husband the appellant had neglected to maintain her and their eight children who were between the ages of 15 and 3 years. The amount of maintenance necessary as a monthly or other allowance was not specified. The appellant was then chief clerk of the Police Court of Tangalla. On 12th November, 1938, the date fixed for the inquiry, the parties were present in Court with their respective proctors who notified a settlement of which a record was made by the Magistrate. According to its terms, the appellant undertook liability for the payment of the house-rent, the children's fees, and a debt incurred by the respondent. The appellant also undertook to pay the respondent a sum of Rs. 60 for the rest of the month of November. The more material part of the recorded settlement is as follows :—

> "From the first of December, respondent (meaning the defendant) undertakes to send applicant for the maintenance of herself and the children Rs. 85 in addition to paying house-rent, medical bills and children's schooling expenses himself direct."

The Court made no order of any kind. The journal entries thereafter show that the respondent had moved for requisitions for the payment of sums of money deposited by the appellant to her credit and that such requisitions were issued to her. There were also other incidental matters and applications made by both parties, but these were inconsequential. In April 1939, the appellant, setting out various grounds, moved for a cancellation of *the maintenance order* (presumably on the assumption that there was in fact such an order). On 10.5.39, in the presence of the parties and their respective proctors, the Magistrate made another record of an arrangement regarding the schooling of three of the children. That record continued thus :—

> "In view of the new arrangement whereby the three boys will be in the college boarding, *it is agreed that the respondent* (meaning the defendant) *should pay Rs. 75 a month hereafter commencing 1st June 1939 as maintenance for applicant and the five children now in her custody and inclusive of house rent.* It is agreed that money is to be sent to applicant to Valvettiturai by money order."

No order of any kind was made on this new arrangement either. Nothing of any consequence took place thereafter until 3rd November 1956, i.e., 17½ years later, when the respondent moved for a distress warrant on the appellant for Rs. 1,850 and costs stating that the appellant had failed to pay maintenance for six years and two months from August 1950 to October 1956. On that occasion the respondent gave evidence before the Magistrate. This is all she said :

> "I am the wife of the defendant A. Kanapathipillai of Puloly North, Sornakiri, Point Pedro. The defendant is in default of arrears of maintenance for 6 years. I ask for a distress warrant on the deft. for Rs. 1,850."
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> B. G. S. David
> Mag.

She did not state how the amount was calculated, or in respect of what members of the family the default had been committed. Nor did the Magistrate direct his mind to this matter though it was obligatory on him to do so since some of the children at any rate had grown past the age of maintenance at the time the alleged default in payment was committed by the appellant. Under section 7 of Cap. 76, no order for an allowance for the maintenance of any child shall, except for the purpose of recovering money previously due under such order, be valid after the child has attained the age of sixteen years, or eighteen years in certain circumstances, or after the death of such child. The Magistrate, however, issued a warrant for Rs. 1,850 and costs Rs. 5·25. *The warrant stated that an order had been duly made against the appellant requiring him to pay as maintenance the monthly sum of Rs. 1,850 in arrears.*

These statements were both fictitious and paradoxical and had become necessary because the Form of the warrant No. 2 prescribed by Cap. 76 and adopted by the respondent required a disclosure inter alia that (1) an order for maintenance had been duly made, and (2) such order specified a monthly sum. When the Fiscal sought to execute the warrant, the appellant questioned its legality by a letter of protest which was sent to the Magistrate by the Fiscal with his report that the appellant was not possessed of any movable property in his division. The Magistrate thereupon held an inquiry on 8th December 1956 when *the respondent stated in evidence that the order made on 10.5.39 was a composite order for herself and her five children in a sum of Rs. 75,* and she asked only Rs. 12·50 a month, being one-sixth of the total amount ordered by the Court. She asked for a distress warrant for Rs. 925, which sum she alleged was due to her for the period from August 1950 to October 1956. She admitted that her previous application for the distress warrant was on the footing that she was entitled to Rs. 25 a month, which was the sum according to her the appellant had been paying. The appellant also gave evidence setting out the previous history. At the conclusion of the inquiry, his counsel pointed out to the Magistrate that there were no valid orders for maintenance in

respect of the applicant or of her children. On 12th January 1957, the learned Magistrate delivered his order directing the issue of a distress warrant for Rs. 925, i.e., 74 months arrears of maintenance at Rs. 12·50 a month. The appeal was taken from that order. The grounds for making it have been stated by the learned Magistrate as follows :—

"It is undoubtedly true that *both orders are composite orders*—no specified amount has been fixed for each of the persons to be benefited, but a lump sum has been *ordered* in each case. But it is common ground that the maintenance *orders* were made with the consent of the parties, and what is more, had been acted upon for a number of years. The first *order* was made on 12.11.38 with the consent of the parties, and the second on 10.5.39 again with the consent of the parties. On the defendant's own showing, these *orders* were acted upon till December 1944, that is a period of six years. It is only now that the *defendant questions the validity of the orders which he himself was instrumental in making* and upon which he had acted for six years.

Counsel have not been able to cite to me any authorities on the point, but I do not think it unreasonable to assume that *when a composite order is made, the Court intends that the parties to be benefited should each take an equal share of the total amount so ordered.* If the Court had intended that the parties should be benefited in different amounts each, it would have been so stated in the *order* . . . . The *order of maintenance made on 10.5.39* upon which the applicant now claims arrears fixed the total monthly amount as Rs. 75 for her and her five children, so that each one of them could claim to be benefited only to the extent of Rs. 12·50 individually. The applicant cannot therefore insist on claiming more than Rs. 12·50 a month for herself."

It is quite plain that, although both parties have acted for several years as though there had been an order for maintenance, there was in fact no order of any kind. The Magistrate has assumed that there were orders and even thought that the appellant was instrumental in making them, though the Maintenance Ordinance does not confer jurisdiction on a party to the litigation to make orders for maintenance.

When the parties moved the Court in 1938 and 1939 respectively to record the terms of their agreement and new arrangement, these were in fact incapable of being embodied in an enforceable order which had to conform to the provisions of the Maintenance Ordinance. There is no record whatever that either party at any time invited the Court to make an order in conformity with even some part of their arrangements. When he held the inquiry in December 1956, the Magistrate erred in seeking guidance from the evidence of the respondent when she said there was on 10th May 1939 a composite order for herself and her five children in a sum of Rs. 75. On so fundamental a matter, the Magistrate should have been guided not by evidence, which at that stage was indeed irrelevant, but by the record. Even otherwise, I

am not aware of any rule—and none was cited to me—whereby a so-called composite order for maintenance in favour of a mother and children may be split up into equal shares like a lot allotted by a partition decree in common to several persons without a specification of their individual shares.

The record shows not a *composite order* as the Magistrate thinks but a *composite sum* which has not been made the subject of an order. The composite sum mentioned in the arrangement of the parties could not be decomposed by the Magistrate for the purposes stated by him. There being no order made for maintenance at any time in terms of section 2 of the Maintenance Ordinance (Cap. 76), the Magistrate acted without jurisdiction in issuing the warrant against the appellant under section 8. Even in form, the document was not a warrant at all. Learned counsel for the respondent had to concede that the warrant so called was illegally issued. I allow the appeal and set aside with costs the learned Magistrate's order of 12th January 1957.

Appeal allowed.