1962 *Present :* **Basnayake, C.J., H. N. G. Fernando, J., and Sinnetamby, J.**

TENNE, Appellant, *and* EKANAYAKE, Respondent

S. C. 442 of 1960—M. C. Matale, 6823

Maintenance—Jurisdiction—Forum in which application should be made—Maintenance Ordinance, ss. 2, 9, 15, 17—Civil Procedure Code, s. 9.

The Court which has jurisdiction to entertain an application under the Maintenance Ordinance is the Magistrate's Court within whose limits the wife or child having the right to claim maintenance resides. The place of residence of the defendant is not material.

Application was made against the defendant for maintenance in respect of his wife and child. The complainant was the father of the defendant's wife, who was, at the time of the application, an inmate of the Mental Hospital, Angoda. The child, however, was residing at Matale with the complainant.

The defendant was residing at Dumbara, which was outside the territorial jurisdiction of the Magistrate's Court of Matale.

Held, (i) that the Magistrate's Court of Matale had jurisdiction in regard to the claim of the child.

(ii) (SINNETAMBY, J., dissenting), that the claim in regard to the mother of the child should be made in the Magistrate's Court of Colombo.

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

K. C. Kamalanathan, with *M. Shanmugalingam*, for Applicant-Appellant.

Y. L. M. Mansoor, for Defendant-Respondent.

Cur. adv. vult.

March 30, 1962. BASNAYAKE, C.J.—

This appeal first came up for hearing before my brother Sinnetamby but, as a question which appeared to him to be a question of doubt or difficulty arose for adjudication, acting under section 48 of the Courts Ordinance he reserved the question for the decision of more than one Judge of this Court, and under section 48A of that Ordinance I made order constituting a Bench of three Judges for deciding it. The question reserved is whether a Magistrate's Court within whose limits the defendant to an application for maintenance does not reside has no jurisdiction to entertain an application for maintenance.

Briefly the material facts are as follows :—On 10th November 1959 the applicant R. B. Tenne complained to the Court that the defendant V. B. Ekanayake of the Cocoa Research Station, Horticultural Office, Kundasale, who was the husband of his daughter Veera Ekanayake, refused to maintain her or his male child Keerthi Ekanayake aged three. In his evidence he stated that his daughter was since June 1959 an inmate of the Mental Hospital, Angoda, and that the child Keerthi was with him.

It would appear from the following minute made in the record that on his appearance on summons the defendant admitted that he was the husband of the applicant's daughter and the father of the child Keerthi :— " The defendant admits marriage and paternity but has cause to show. "

At the trial the defendant did not call any evidence but submitted that the Court had no jurisdiction to entertain the application as he was resident in Dumbara a place outside the territorial jurisdiction of the Magistrate's Court of Matale. It appears to be common ground that the defendant is resident at a place outside the local limits of the Magistrate's Court of Matale. The learned Magistrate upheld the objection on the ground that he was bound by the decisions of this Court, viz., *Jane Nona v. Van Twest* [1] and *Saraswathy v. Kandiah* [2] cited by the defendant's pleader.

Jane Nona's case holds that the Court which has jurisdiction to entertain an application under the Maintenance Ordinance is the Magistrate's Court within whose territorial jurisdiction the cause of action arises. It proceeds on the basis that as the Maintenance Ordinance itself is silent on the question of territorial jurisdiction it is permissible to resort to the Civil Procedure Code for guidance. In *Saraswathy v. Kandiah* (*supra*), while following *Jane Nona v. Van Twest* (*supra*), which I felt was binding on me, I expressed the view that a Magistrate has jurisdiction to entertain an application under section 2 of the Maintenance Ordinance regardless of the residence of the parties or the place where the cause of action arises. In *Dingirimenika v. Kiriappu* [3], Nagalingam J. in dealing with the question of jurisdiction to enforce an order of maintenance under section 11 of the Maintenance Ordinance held that the jurisdiction to enforce its order is not taken away from the Court by

[1] *(1929) 30 N. L. R. 449.* [2] *(1948) 50 N. L. R. 22.*
[3] *(1950) 52 N. L. R. 378.*

section 11 merely because the defendant has ceased to reside within its local limits. He states *obiter* —

> " In fact, any Magistrate's Court would have jurisdiction to entertain a plaint irrespective of the question where the applicant or the respondent resides. "

Now the first question that has to be considered is whether *Jane Nona's* case has been rightly decided. Is it permissible to apply section 9 of the Civil Procedure Code ? I think not, for the reason that the Civil Procedure Code is made applicable only to actions falling within the ambit of that code. The Maintenance Ordinance provides a special remedy and a special procedure in regard to what was before its enactment a civil right enforceable under the ordinary procedure. It has been held that since the enactment of the Maintenance Ordinance it is no longer competent for a woman to bring a civil action to recover maintenance for herself and her children as a debt due to her and them by the father (*Menikhamy v. Loku Appu* [1]). By the enactment of the Ordinance the common law right became a statutory right enforceable by the procedure prescribed in the statute. Certain provisions of the Criminal Procedure Code (Chapters V and VI, Sections 338 to 352) and the provisions of the Civil Procedure Code relating to costs so far as they may be applicable, have been expressly made applicable to proceedings under the Ordinance (ss. 9, 15 and 17). It has been held (*Anna Perera v. Emaliano Nonis* [2]) that it is not permissible to introduce provisions of the Criminal Procedure Code other than those expressly mentioned. By a parity of reasoning it would follow that it is not permissible to introduce provisions of the Civil Procedure Code other than those made applicable by the Ordinance.

The right conferred by the Maintenance Ordinance is, subject to the limitations laid down therein, a continuing right and resides in the person entitled to it. As the right attends her wherever she may be the aid of the court within whose local limits she is resident for the time being can be invoked by her. It is not necessary to link this right with the concept of a " cause of action " as known to civil proceedings. This view finds support in section 2 of the Maintenance Ordinance which reads—

> " If any person having sufficient means neglects or refuses to maintain his wife, or his legitimate or illegitimate child unable to maintain itself, the Magistrate may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child at such monthly rate, not exceeding one hundred rupees, as the Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct. Such allowance shall be payable from the date of the order."

It seems to contemplate the case of an application being made to the Court where the applicant having the right to claim maintenance resides and not to the Court where the defendant resides.

[1] *(1898) 1 Bal. 161.* [2] *12 N. L. R. 236.*

The above view is consistent with the Full Bench decision in P. C. Negombo 29055, Grenier Reports (1873) P. C. 112, a decision given under the earlier law. In that case this Court held that in cases of maintenance the Court having jurisdiction over the place where a wife or child is left destitute has authority to try a defendant (residing out of such jurisdiction) who is bound to support them. The principle was followed in the later case of *Selestina Fernando v. Mohammed Cassim*[1] wherein Wendt J. stated that the Court within the local limits of which an illegitimate child resides has jurisdiction to entertain an application for the maintenance of such child against its putative father although he may be resident outside the local limits of such Court. *Jane Nona's* case introduces, wrongly in my view, the Civil Procedure Code concept of a cause of action. I adhere therefore to the view I expressed in *Saraswathy's* case as elaborated above.

In the instant case the applicant is not a person entitled to maintenance; but one of the persons so entitled, namely, the child, is with him at his house within the jurisdiction of the Magistrate's Court of Matale. The action in that Court can therefore proceed in regard to the claim of the child. The claim in regard to the mother should be made in the Magistrate's Court of Colombo, for there is no ground on which jurisdiction can be said to be in the Court within whose limits the applicant resides where the applicant is not the person seeking maintenance.

H. N. G. FERNANDO, J.—I agree.

SINNETAMBY, J.—

The question that arises for decision in this case relates to the forum in which an application for maintenance may be made by a wife on behalf of a daughter whom the respondent, her husband, has failed and neglected to maintain. The learned Magistrate to whom the application was made held that he had no jurisdiction because the defendant-respondent resided outside the local limits of the jurisdiction of his court. He applied the test of the defendant's residence in deciding the question of jurisdiction and in doing so followed two earlier decisions of this Court, viz : *Jane Nona v. Van Twest*[2] and *Saraswathy v. Kandiah*[3]. The case of *Dingirimenika v. Kiriappu*[4] was apparently not cited to the learned Magistrate.

When this appeal first came up before me sitting alone, as the matter was one of considerable importance and questions of difficulty arose, I referred it to My Lord the Chief Justice so that steps may be taken to list the case for consideration by a bench of more than one Judge of this Court. My own inclination was to follow the opinion expressed, though obiter, by Nagalingam, J. in *Dingirimenika v. Kiriappu* (*supra*).

[1] *(1908) 11 N. L. R. 329.*
[2] *(1929) 30 N. L. R. 449.*
[3] *(1948) 50 N. L. R. 22.*
[4] *(1950) 52 N. L. R. 378.*

His view finds support in the observations of Basnayake, J. as he then was, in *Saraswathy v. Kandiah* (*supra*). In the latter case, Basnayake, J. was not disposed to agree with the earlier decisions but, nevertheless, felt obliged to follow *Jane Nona v. Van Twest* (*supra*) which was a decision of two Judges. In the course of his judgment, he made the following observations :—

> " My own view is that a Magistrate has jurisdiction to entertain an application under Section 2 regardless of the residence of the parties or the place where the cause of action arises."

I take this passage to mean that any Magistrate's Court, irrespective of the residence of parties, has jurisdiction to entertain an application for maintenance. The mere fact that it is not the person entitled to maintenance who makes the application should not affect the question.

In my opinion, therefore, an application for maintenance can be made by an applicant whether on his or her own behalf or on behalf of another in any Magistrate's Court, and is in no way affected by the place of residence of the defendant or of the applicant or of the person on whose behalf the application is being made.

I, therefore, hold that the Magistrate's Court of Matale had jurisdiction to entertain the application made in this case by the applicant on behalf of her daughter. I would accordingly set aside the order of the learned Magistrate and remit the case to him for further proceedings to be taken according to law. The applicant will be entitled to the costs of this appeal.

Appeal partly allowed.