

Missi Nona. S. A V. Weerasooriya. J. A

186/1965

Present: Alles, J.

S. A. MISSI NONA, Appellant, and J. A. WEERASOORIYA, Respondent

S. C. 593/1965—M. C. Colombo, 32234/A

Maintenance—Examination of applicant before issue of summons—Manner of recording it—Maintenance Ordinance, ss. 14, 16—Criminal Procedure Code, ss. 298, 299.

When, in an application for an order of maintenance, the examination of the applicant prior to issue of summons is recorded by the Magistrate in terms of sections 14 and 16 of the Maintenance Ordinance and section 298 of the Criminal Procedure Code, it is not necessary to comply with the provisions of section 299 of the Criminal Procedure Code relating, inter alia, to reading over the evidence to the witness.

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

E. St. N. D. Tillekeratne, for the applicant-appellant.

No appearance for the defendant-respondent.

Cur. adv. vult.

October 28, 1965. **ALLES, J.**—

This is an appeal by an applicant in maintenance proceedings dismissing her application for maintenance against the defendant in respect of her illegitimate child. In the course of the proceedings, the defendant admitted paternity but submitted that the applicant could not maintain the action.

The proceedings commenced with an application under section 13 of the Maintenance Ordinance for an order of maintenance. In her application made on 14th February, 1964, the applicant said that the child was born on 28th April, 1962, although in her evidence under section 14 of the Ordinance she said she gave birth to the child on 28th April, 1963. In the course of the proceedings, the Birth Certificate was produced marked PI according to which the child was born on 28th April, 1962. Since the application was made twelve months after the birth of the child, there should have been evidence that during that period the father had maintained the child—vide section 6 of the Ordinance. In her testimony recorded under section 14 she said that the defendant had “ failed to maintain the child since its birth ” although in the course of the trial she said that the defendant gave her two sums of money, Rs. 10 and Rs. 5 for the child two months after its birth. In view of the discrepancy between the applicant’s evidence under section 14 and her subsequent evidence at the trial, the Magistrate quite rightly disbelieved her and her witnesses with regard to these payments and I see no reason to interfere with his finding on this question of fact.

The only matter that arises for consideration in this appeal is whether I should accede to the submission of Counsel for the applicant that the case should be sent back for re-trial before another Magistrate, since in his submission there has been a breach of the mandatory provisions of section 14. Section 14 provides that on an application for maintenance under section 13, the Magistrate shall commence the inquiry by examining the applicant on oath or affirmation and that such examination shall be duly recorded. It is now settled law that it is a condition-precedent to the issue of summons in proceedings under the Maintenance Ordinance that the oral testimony of the applicant must be taken on oath or affirmation, so that the Magistrate may be satisfied that there is sufficient ground for further proceedings ; a non-compliance with these provisions of the law would render a subsequent inquiry null and void—vide *Rupasinghe v. Somawathie* [1 (1959) 61 N. L. R. 457] and *Baby Nona v Kahingala* [2 (1964) 66 N. L. R. 361.].

Counsel in the present case however relied on the following passage in the judgment of Basnayake, C. J. in *Rupasinghe v. Somawathie* (supra) at page 459 :—

“ The deposition of an applicant who is examined under section 14 must be recorded as prescribed in section 298 of the Criminal Procedure Code and read over to the witness as required by section 299 (1) of that Code and the other requirements of that section must be complied with. The requirements of section 14 and the provisions of the Code have not been complied with. That non-compliance is fatal to the order made by the Magistrate and renders it null and void.” In his submission since the provisions of section 299 of the Criminal Procedure Code were not complied with in the present case the entire proceedings are null and void and therefore the applicant is entitled to a re-trial.

In *Anna Perera v. Emaliano Nonis* [3 (1908) 12 N. L. R. at 262] a Bench of two Judges consisting of Justice Middleton and Justice Wood Renton (as he then was) held that only those sections of the Criminal Procedure Code which are expressly incorporated into the Maintenance Ordinance are applicable to proceedings under the Ordinance. Wood Renton, J. specifically drew attention to sections 15, 16 and 17 of the Ordinance. The decision in *Anna Perera v. Emaliano Nonis* was followed by Basnayake, C. J. in *Baby Nona v. Kahingala*. The learned Chief Justice specifically drew attention to the fact that a Magistrate when acting under the Ordinance may exercise only the powers expressly conferred on the Magistrate's Court under the Criminal Procedure Code. He then proceeded to examine the provisions of sections 15, 16 and 17 of the Maintenance Ordinance under which it was possible to invoke the various provisions of the Criminal Procedure Code and concluded by saying that “ only those provisions of the Criminal Procedure Code expressly declared to be applicable to the proceedings under the Ordinance, apply.” Section 16 of the Maintenance Ordinance requires that all evidence shall be recorded in the manner prescribed for trials in the Magistrate's Court and section 298 of the Criminal Procedure Code prescribes the procedure for recording evidence at inquiries and trials in District Courts and Magistrate's

Courts. Therefore that portion of the learned Chief Justice's dictum which states that section 298 of the Criminal Procedure Code is applicable to the recording of evidence in proceedings under the Maintenance Ordinance can be supported. But with all respect to the learned Chief Justice that portion of the dictum which states that the provisions of section 299 apply would appear to have been made *per incuriam*. This view is fortified by the observations made by Weerasooriya, J. in *Gunadasa v. Pemawathie* [1 (1961) 65 N. L. R. 46, 60 C. L. W. 19] where the learned Judge took the same view which I have taken in this case. At the time Weerasooriya, J. delivered his order in *Gunadasa v. Pemawathie* he did not have the advantage of the learned Chief Justice's observations in the Divisional Bench case of *Baby Nona v. Kahingala* where no reference is made whatsoever to either section 298 or section 299 of the Criminal Procedure Code. It is not out of place to note that in *Rupasinghe v. Somawathie* the reference was made to a Bench of two Judges in view of the conflicting decisions in *Namasivayam v. Saraswathy* [2 (1949) 50 N. L. R. 333.] and *Sebastianpillai v. Magdalen* [(1949) 50 N. L. R. 494.] as to whether the examination of an applicant on oath or affirmation was a condition-precedent to the issue of summons in maintenance proceedings. The manner in which that evidence has to be led was not one of the matters which was referred to the Bench for decision.

Finally, having regard to the purpose for which the evidence of the applicant has to be led under section 14 before the issue of summons, it seems unnecessary that the intricate procedure laid down in section 299 should be strictly complied with. The only object of leading the evidence of the applicant on oath or affirmation under section 14 is to ensure that the Magistrate is satisfied that it is a fit case in which summons should issue ; as stated by Basnayake, C. J. in *Namasivayam v. Saraswathy*, " the legislature has in its wisdom enacted this provision as a safeguard against a person being summoned on an unsworn allegation to answer charges of neglect or refusal to maintain his wife or child legitimate or illegitimate ". It is unnecessary to follow the procedure laid down in section 299 of the Criminal Procedure Code in order to achieve this object. I am therefore of the view that Counsel's submission that

section 299 of the Criminal Procedure Code should be complied with in an examination under section 14 of the Maintenance Ordinance is unnecessary. The appeal is therefore dismissed.

Appeal dismissed.