SAMILI DE SILVA
v.
GRACE DE SILVA

COURT OF APPEAL.
W. N. D. PERERA, J.
EDUSSURIYA, J.
DR. ANANDA GRERO, J.
M. C. BALAPITIYA 21933.
C.A. 5/91 (M)
NOVEMBER 29, AND DECEMBER 6, 1993.

Maintenance Ordinance – Amendment 19 of 1972 S. 12, S. 13, S. 14 – Application for Maintenance – Signed by an Attorney-at-Law – Appeal – Revision – Patent lack of jurisdiction – S. 41(2), S. 46(2) Judicature Act – S. 31 (B) of Industrial Disputes Act – Regulations 15, 17 Mandatory – Directory.

The learned Magistrate on 1.4.91 ordered that a sum of Rs. 350/- be paid to the Respondent wife and the child. Against this order the Appellant lodged an appeal.

The Respondent's Counsel raised a preliminary objection that the appeal was out of time. The appellant's Counsel thereafter moved Court to act in Revision as the Application for Maintenance in the Magistrates Court had been signed by an Attorney-at-Law which rendered all proceedings a nullity. This matter was referred to a Bench of 3 Judges to decide the following questions of law –

(1) Whether the Respondent-Appellant is entitled to move the Court of Appeal to exercise its Revisionary jurisdiction; on the ground that there is a patent lack of jurisdiction, as the application has not been made in terms of S. 13 of the Maintenance Ordinance.

(2) Whether an application signed by an Attorney-at-Law for the applicant is sufficient compliance of S. 13 of the Maintenance Ordinance.

(3) Whether the application falls within the ambit of S. 13.

Held:

Dr. Ananda Grero (dissenting).

(i) S. 14 of the Maintenance Ordinance requires an application to be supported by an affidavit, which the applicant had rendered.

This affidavit contains an application for Maintenance apart from the other material that is required to be affirmed to by way of affidavit for the purpose of issuing summons.

Therefore the application for Maintenance satisfies the requirement in S. 13, that an application should be signed by the applicant even if S. 13 is mandatory. In view of above there is no illegality which renders the subsequent proceedings a nullity. There is no cause to act in Revision.

(ii) S. 41(1) of the Judicature Act entitles an Attorney-at-Law to assist, advise clients and to appear, plead or act in every court or other institution established for the administration of justice.

(iii) S. 13 is only an enabling section, which authorise an applicant to apply for maintenance, but it does not prohibit an Attorney-at-Law from signing and presenting an application on behalf of a person applying for maintenance.

(iv) S. 13 is not mandatory and there is no illegality or irregularity in an application signed by an Attorney-at-Law being presented to court under S. 13.

APPLICATION in Revision of the Order of the Magistrates Court of Balapitiya.

Cases referred to:

1. *Chandradasa Gunatilake* v. *H. M. Punchi Menika* C.A. 941/78 – C.A. Minutes 19.2.1981.
2. C.A. 916/89 C.A. Minutes 22.12.1990.
3. C.A. 114/89 – C.A. Minutes 8.5.1992.
4. *CWE v. J. M. Jayasundera* – S.C. Appeal 45/86 S.C. Minutes 25.11.1988.
5. *Ranesinghe v. Henry* 1 NLR 303.
6. *Rustoms v. Hapangama & Co.*. 1978-79 SLLR Vol 2 Parts 8 at 225.
7. *Baby Nona v. Kahingala* 66 NLR Pge. 367.

Rohan Sahabandu for Respondent-Appellant.

Percy Wickramasekera with *Champani Padmasekera* and *P. Jesudasan* for Applicant-Respondent.

Cur. adv. vult.

January 12, 1994.

EDUSSURIYA, J.

The appellant in this case filed an appeal from the order of the learned Magistrate ordering him to pay maintenance for his wife and child.

When the appeal was taken up for hearing it was found that the appeal was out of time and at that stage the appellant's counsel invited Court to exercise its revisionary powers and set aside the order of the learned Magistrate on the ground that the application for maintenance had been signed by an Attorney-at-Law and not the applicant, which according to counsel's contention rendered all proceedings a nullity. Thereupon this case was referred to a Bench of three Judges.

Counsel for the appellant contended that proceedings commence on an application signed by an applicant being presented to Court and in the absence of such an application signed by the applicant, all proceedings taken thereafter were a nullity since there was no valid application before Court.

Counsel for the appellant drew our attention to the decision in *C. A. 941/78* [1] and *C. A. 916/89* [2]

In the former case a bench of Two judges of this Court held that an application signed by an attorney-at-law does not conform to the requirement of S.13 which expressly states that it shall be signed by the applicant, because unlike in the District Courts the question of proxy does not arise and these being proceedings in the nature of criminal proceedings where the law requires an application to be filed in a particular manner, it is necessary that there should be compliance with that requirement.

In the C. A. Application No. 916/89 – (*supra*) which was an application in Revision, Justice S. N. Silva held that he was bound by the decision in C.A. 941/78 (*Supra*) which held that the requirement as contained in S. 13 that an application for Maintenance should be signed by the applicant is mandatory and set aside the order of the Learned Magistrate.

In the case before us the affidavit that has been filed along with the application contains an application for maintenance apart from the other material that is required to be affirmed to by way of affidavit for the purpose of issuing summons. It is therefore our considered view that the application for maintenance contained therein satisfies the requirement in S.13 that an application should be signed by the applicant, even if S.13 is considered to be mandatory.

Although, there was an affidavit signed by the applicant filed in C.A. 941/18 (*Supra*) the question whether an application for maintenance in the affidavit itself satisfies the requirement in S. 13 does not appear to have been considered in that case. It is also not known whether there was such an application in the affidavit.

In C. A. Application 916/89 (*Supra*) no affidavit had been filed.

In view of what we have stated above there is no illegality which renders the subsequent proceedings in the case before us a nullity. We see no cause to act in revision and also reject the appeal which is out of time.

However I will now proceed to consider whether S. 13 is mandatory and the decisions in C. A. 941/78 and C. A. 916/89 (*Supra*), which held that an application for maintenance signed by an attorney-at-law does not conform to the requirement of S. 13.

Counsel for the appellant contended that proceedings commence on an application signed by the applicant being presented to Court and in the absence of such an application all proceedings taken thereafter were a nullity.

In this connection the counsel for the respondent submitted that the effect of S. 41(2) of the Judicature Act had not been considered in the decisions in C.A. 941/78, C.A.916/89 (*supra*) and C.A.114/89 [3] and drew our attention to the judgment in the Board of Directors, *C. W. E. v. J. M. Jayasundera* [4] which held that S. 31B (i) of the Industrial Disputes Act which sets out that a workman or a Trade Union on behalf of a workman who is a member of that Union may make an application in writing for relief or redress, read with Regulations 15 and 17 requiring that every application under S. 31B of the Industrial Disputes Act shall be substantially in Form D set out in the first schedule which provided for the applicant or the President of the Union to which the workman belonged to sign it was not mandatory, in so far as S. 31B is an enabling section. It was also held that under S. 41(2) of the Judicature Act an attorney-at-law was not prohibited from signing such an application.

The counsel for the appellant in this case seeking to draw a distinction between the words in S. 31B of the Industrial Disputes Act which sets out that a workman or a trade union on behalf of a workman who is a member of that Union **may make an application** and the words in S.13 of the Maintenance Ordinance which sets out that every application for an order of maintenance **shall be in writing and shall be signed by the applicant** submitted that S.13 of the

Maintenance Ordinance prohibits anyone other than the applicant herself from signing an application.

It must be noted that S.31B of the Industrial Disputes Act read with Regulations 15 and 17 which require that an application under S.31B **shall be substantially in Form D** set out in the first schedule provide for the applicant or the President of the Union to sign it. So that taken together the "wording" in S. 31B and Regulations 15 and 17 is similar to S. 13 of the Maintenance Ordinance.

In fact the contention in that case was that, since Form D in the Industrial Disputes Act had provision for the signature of the applicant, that it was mandatory that the application be signed by the applicant.

Justice Athukorale with the other two Judges agreeing held that section 31B of the Industrial Disputes Act read with Regulations 15 and 17 and Form D was not couched in prohibitory terms and that there is nothing exfacie in the section itself to preclude a lawyer from making an application on behalf of an applicant and further that in construing section 31B read with Regulations 15 and 17 and Form D, the effect of S. 46(2) of the Industrial Disputes Act which provides for an Attorney-at-Law to appear on behalf of any party to such proceedings and S.41(1) of the Judicature Act must be considered. Justice Athukorale went on to express the view that the words "In any proceeding under this Act" in S. 46(2) include the filing of an application since a proceeding commences at the moment of the filling of the application and therefore there is no logical reason for depriving an applicant who is a workman the right of appearance through a lawyer at only the initial stage, which perhaps is the most vital stage in an application under S.31B of the Industrial Disputes Act. Justice Athukorale went on to state that the question of a lawyer presenting an application on behalf of an applicant has been put beyond any manner of doubt by virtue of the provisions of S. 41(1) of the Judicature Act, which entitles an attorney-at-law to assist, advise clients and to appear, plead or act in every Court or other institution established for the administration of Justice.

Section 12 of the Maintenance Ordinance sets out that a **Person applying for an order of maintenance may appear personally or by pleader,** which must certainly include without any manner of doubt the act of applying for maintenance itself.

As Justice Athukorale has stated in the course of his judgment in the Board of Directors of the *C.W.E. v. J. M. Jayasundera* (*supra*) a proceeding commences at the moment of filling an application, and therefore there is no logical reason for depriving an applicant who is a workman the right of appearance through a lawyer at only the initial stage, which perhaps is the most vital stage.

S.14 of the Maintenance Ordinance requires an application to be supported by an affidavit stating the fact in support of the application and it is only if the Court is satisfied that the facts set out in the affidavit are sufficient that summons shall issue on the defendant. So that the issue of summons depends entirely on the material contained in the accompanying affidavit of the applicant. This certainly requires the advise of an attorney-at-law for example with regard to S. 6 etc.

Then, can there be any logical reason for depriving an applicant who in a maintenance case is either making an application for maintenance for herself and her child or her illegitimate child, being deprived of applying for maintenance through an attorney-at-law? We therefore, hold that S.12 empowers an attorney-at-law to make an application signed by him on behalf of an applicant.

Further, without any doubt an application for maintenance is a pleading and S.41(1) of the Judicature Act provides that every attorney-at-law shall be entitled to assist and advise clients and to appear, plead or act in every Court established for the administration of Justice.

Therefore, we hold that S.13 is only an enabling section, which authorises an applicant to apply for maintenance but that it does not prohibit attorneys-at-law from signing and presenting an application on behalf of a person applying for maintenance especially in the light of S. 41(1) of the Judicature Act.

Further, it is our view that S. 13 has been enacted with the intention of enabling an applicant to (without the assistance of an attorney-at-law) make an application without incurring expenses by presenting the application through an attorney-at-law. It is for this reason that an application is exempted from stamp duty too.

For the above mentioned reasons we are of the view that S. 13 of the Maintenance Ordinance is not mandatory and that there is no illegality or irregularity in an application signed by an attorney-at-law being presented to Court under S. 13.

W. N. D. PERERA, J. – I agree.

Appeal is rejected with costs.

Application to act in Revision refused.

ANANDA GRERO, J. (Dissenting)

At the conclusion of the hearing in the above mentioned case, I decided to write a separate order. The President of the Court of Appeal referred to a Divisional Bench comprising of three Judges of the Court of Appeal (one of whom is myself, and the other two are, Hon. W. N. D. Perera, J. and Hon. P. Edussuriya, J.) to decide the following questions of law.

(i) Whether the respondent-appellant who did not make an application for Revision is entitled at this stage (at the hearing of the appeal) to make a request to this Court, to exercise its revisionary jurisdiction in order to review and set aside the order of the Learned Magistrate dated 4.1.91, on the ground that on the face of the record, there is a patent lack of jurisdiction for the Magistrate's Court to inquire into the application of the applicant-respondent as the said application has not been made in terms of Section 13 of the Maintenance Ordinance.

(ii) Whether an application signed by the Attorney-at-Law for the applicant is sufficient compliance with the provisions of the said Section 13, and what exact interpretation should be given to the said Section.

(iii) Whether the application of the applicant-respondent falls within the ambit of section 13 of the Maintenance Ordinance.

The Learned Magistrate of Balapitiya by his order dated 1.4.91 held that the applicant-respondent is the wife of the respondent-appellant and he too is also the father of the child by the name Saman Deshapriya. As he failed and neglected to maintain them, he had ordered him to pay Rs. 350/- for each of them as maintenance for a month from the date of the application.

Against the aforesaid order, an appeal was made to this Court by the respondent-appellant. At the commencement of hearing of the appeal, the Learned Counsel for the applicant-respondent raised a preliminary objection that the appeal is out of time and it should therefore be dismissed without going into the merits of the appeal. At that stage the Learned Counsel for the respondent-appellant invited the Court to exercise its revisionary powers in order to review and set aside the Magistrate's order on the basis of issue No. 1 stated above.

After hearing the submissions made by both counsel for and against the application made by the counsel for the respondent-appellant, the Court decided to formulate the questions of law with the assistance of both counsel in order to get a ruling from a Divisional Bench, as conflicting decisions of both the Supreme Court and the Court of Appeal were cited by them before me. The result was, that this matter finally came up before three of us.

The Learned Counsel for the respondent-appellant contended that the applicant-respondent has not complied with the mandatory provisions of Section 13 of the Maintenance Ordinance (as amended by Maintenance (Amendment) Act No. 19 of 1972) and therefore there was no proper application before the Learned Magistrate to act upon her application. But the Learned Magistrate has acted on such application and made an order, which he says is without jurisdiction. He further contended that when there is patent lack of jurisdiction to entertain and inquire into the application in question by the Magistrate, this court has the powers of Revision to review and set aside such an order if the Court is satisfied that the original Court acted without jurisdiction.

To support his contention he cited, a number of authorities *Ranesinghe v. Henry et al* [5], *Rustom v. Hapangama & Co.* [6]

The Learned Counsel for applicant-respondent contended that there was a proper application before the learned Magistrate and therefore there was no question of any lack of jurisdiction for him to entertain and inquire into such application and finally to make an appropriate order.

It is common ground that the application in question is signed by the Attorney-at-Law of the applicant-respondent. She has not signed it. The affidavit is signed by the applicant-respondent.

It is the contention of the Learned Counsel for the respondent-appellant that in view of the provisions of Section 13 of the Maintenance (Amendment) Act No. 19 of 1972 the application should be signed by the applicant herself and not by her Attorney-at-Law. He cited the judgment of Abdul Cader J. and Athukorale, J. in the Case of *Chandradasa Gunatillake v. H. M. Punchi Menika,* C.A. Case No. 941/78 (*supra*), where it was held that an application signed by an Attorney-at-Law (in a maintenance case) does not conform to the requirement of Section 13 which expressly states that it shall be signed by the applicant. He also cited a case decided by S. N. Silva, J., where he followed the above stated decision (*Gunatillake v. Punchi Menika*) and held that an application in a maintenance case shall be signed by the applicant. (Vide C.A. Application No. 916/86, (*supra*). Apart from the aforesaid decisions, he also cited a case decided by me (C.A. Application No. 114/89 (*Supra*), where I followed the said two decisions and held that an application which has not been signed by the applicant is not a valid one as such an application is made contrary to the provisions of Section 13 of the Act.

The Learned Counsel for the applicant-respondent relied heavily on the judgment of the Supreme Court, in the case of The Board of Directors of the *C.W.E. v. J. M. Jayasundera* (*Supra*).

Based on this judgment the learned Counsel for the applicant-respondent contended that the word "shall" in section 13 of the Maintenance Ordinance is directory and not mandatory. **In other words Section 13 is only an enabling section.**

In the aforementioned case Atukorale, J. considered Section 31B (1) of the Industrial Disputes Act along with Regulation 15 made by the Minister under the provisions of the said Act. Having considered so he held as follows:

"Section 31B (1) is itself only an enabling section. It only empowers an applicant (whether he be a workman or a trade union on his behalf) to make an application in respect of certain specified matters. It is a permissive section. It does not, by itself or read in conjunction with 15 and 17 Form D, seek to prohibit other persons (including lawyers) from making applications on behalf of an applicant" (vide page 7 of the judgment).

A careful examination of Section 31B (1) of the Industrial Disputes Act reveals, that it is worded or constructed in such a manner that it falls into the category of a permissive section. But it is not so in the case of Section 13 of the Maintenance (Amendment) Act, No.19 of 1972. It is as follows:

"Every application for an order of maintenance or to enforce such an order **shall** be in writing an **shall** be signed by the applicant and **shall** be free of any stamp duty. Every summons to a defendant or witness **shall** also be free of stamp duty".

> **The manner in which the aforesaid section is worded or constructed shows, that its provisions are "mandatory" and not "directory". It has the effect of a command to do certain things in a way prescribed by the section itself. It is not just a permissive section. Every step contemplated in this section should be taken strictly according to the prescribed manner.**

Athukorale, J. had no opportunity to compare and contrast section 31B (1) of the Industrial Disputes Act with Section 13 of the

Maintenance Ordinance. In the case of *Chandradasa Gunatillake v. H. M. Punchi Menika* (*Supra*) he agreed with the decision of Abdul Cader, J. when he held that an application signed by an Attorney-at-Law does not conform to the requirement of Section 13 which expressly states that it shall be signed by the applicant. If Athukorale, J. took a different view he would have stated so. On the contrary he agreed with Justice Abdul Cader's judgment.

Athukorale, J. in his judgment in the case of the Board of Directors *C. W. E., v. Jayasundera* (*Supra*) expressed the view that where negative or prohibitory terms are couched in a section then it is only the applicant himself who could make the application and no one else.

I am of the view that the wording of Section 13 of the Maintenance Ordinance is such, that it prohibits any other person to sign an application made under it, other than the applicant. The applicant concerned is the wife of a husband who has failed and neglected to maintain her, or the mother of a legitimate or an illegitimate child. Such applicant has to sign the application and it is mandatory.

If the intention of the legislature, was, to allow an Attorney-at-Law to sign such an application on her behalf then it would have stated so in the section itself. As stated earlier the word used in the section is "shall". In the case of *Baby Nona v. Kahingala* [7] Basnayake, C.J. dealing with the word "shall" used in a statute observed as follows:

"The word "shall" is imperative and whenever a statute declares that a thing "shall" be done, the natural and proper meaning is that a peremptory mandate is enjoined unless, that context contains clear words which indicate that direction is not compulsory but discretionary".

In the aforesaid circumstances I am of the view that the words **"shall be signed by the applicant"** in Section 13 of the Act are compulsory or mandatory and it is only the applicant and nobody else who could sign an application made under the said section An Attorney-at-Law is not empowered to sign an application for maintenance on behalf of the applicant.

In the instant case the application is in writing, but not signed by the applicant-respondent. Such an application has been entertained and inquired into by the learned Magistrate. Unless an application conforms to the strict provisions of Section 13, and Section 14 of the Act, it cannot be held, that there is a proper application before Court to proceed with it and to make an appropriate order for maintenance. It is the proper and valid application made in conformity with the provisions of sections 13 and 14 of the Maintenance (Amendment) Act, No. 19 of 1972 read with Section 2 of the Maintenance Ordinance that confer the jurisdiction on a Magistrate to entertain and inquire into such application and make an order.

It is crystal clear that the application made in this case is contrary to the provisions of section 13 of the Act. It does not fall within the ambit of Section 13 of the Act.

Thus it is noticeable, that there is a patent lack of jurisdiction for the Magistrate to entertain the application in question and to inquire into it. In such circumstances this Court has the power by way of Revision to review and set aside the order made by the learned Magistrate although the respondent-appellant did not come to this Court by way of an application for Revision. When it is brought to the notice of this Court (as in this case) that the learned Magistrate had acted without a proper application before him, then too this Court has the power to act in Revision and to make an appropriate order.

For the above said reasons I am unable to agree with the submissions of the Learned Counsel for the applicant-respondent that there was a proper application before the learned Magistrate to act upon it.

It was contended that the affidavit filed by the applicant-respondent in this case satisfies the provisions of both Sections 13 and 14 of the Act. In other words, the affidavit satisfies the requirement of Section 13 and 14 of the Maintenance Act, I am unable to agree with this contention.

An examination of Sections 13 and 14 of the aforesaid Act clearly reveals that there shall be two documents namely the application as contemplated in Section 13, and in affidavit as stated in Section 14 of the Act.

If the intention of the legislature was to couch both the application and the affidavit in one document namely, the affidavit it would have clearly stated so in the Act. But it wanted an application supported by an affidavit. Section 14(1) states:

"Every application for an order of maintenance or to enforce an order of maintenance shall be supported by an affidavit stating the facts in support of the application ..."

The construction of the two sections (S. 13 and 14) is such that it is difficult to agree that both the application and the affidavit can be couched in the affidavit. When the provisions of these two sections are mandatory they should be strictly followed. One is not entitled to deviate from such mandatory provisions of these two sections. In the circumstances, I am of the view, that the affidavit filed in this case does not comply the provisions of Section 13 of the Act.

In the aforesaid circumstances, I am of the view that the application in this case has been filed contrary to the relevant law. The result is, that this Court is empowered to act in Revision and set aside all the proceedings taken after filing the application and also to set aside the order for maintenance made in favour of the applicant-respondent and her child. Thus acting in Revision I set aside all such proceedings and the order of maintenance in this case. but her right to make a fresh application if she so desires is reserved hereby. I make no order for costs.

Acting in Revision; Order set aside.

By Majority decision appeal rejected.

Note by Editor:

'Special Leave to Appeal to the Supreme Court was refused by the Supreme Court in S.C. SP. LA 57/94'.