

1954

Present: Nagalingam A.C.J.

W. J. SILVA, Appellant, and L. KARUNAWATHIE, Respondent

S. C. 856—M. C. Galle, 6,580

Maintenance—Child—Order made in divorce proceedings—Jurisdiction of Magistrate's Court to award maintenance subsequently.

Where an order for the maintenance of a child entered in divorce proceedings has been carried out by the deposit of a certain sum of money in the District Court, the jurisdiction of a Magistrate to make a subsequent order for the maintenance of that child becomes ousted to that extent.

APPPEAL from a judgment of the Magistrate's Court, Galle.

Christie Seneviratne, with Felix Dias, for the respondent-appellant.

A. L. Jayasuriya, with J. C. Thurairatnam, for the applicant-respondent.

Cur. adv. vult.

March 30, 1954. NAGALINGAM A.C.J.—

This is an appeal by the father of a child named Upali from an order of the learned Magistrate of Galle ordering him to pay a sum of Rs. 30 a month as maintenance.

The child is the legitimate child of the appellant. The appellant was sued in the District Court of Galle for divorce in proceeding No. X. 615 by the mother of the child, the respondent in these proceedings, and the

learned District Judge on being satisfied upon the evidence decreed a divorce dissolving the marriage of the parents of the child. In the course of those proceedings the mother stated that she was able to maintain the child but that the defendant, the father, should pay a sum of Rs. 1,200 by way of alimony for the child and it was agreed that the sum of Rs. 1,200 so deposited should remain in Court and should be paid along with the accrued interest thereon to the child on his attaining majority.

It was contended on behalf of the appellant that the order in the divorce proceedings precluded the learned Magistrate from making an order in these proceedings. The point raised by the appellant before the learned Magistrate has been decided by a Divisional Bench in the case of *Fernando v. Amarasena*¹ where it was expressly laid down that the existence of a decree of a civil court for alimony does not oust jurisdiction of the Magistrate to make an order under the Maintenance Ordinance where the father fails to maintain the child.

The point however stressed on appeal is that though the law may have been laid down in that sense it must be qualified to the extent that if it is shown that the order made in civil proceedings is not merely a paper order but one which has been carried out, then the jurisdiction of the Magistrate becomes ousted. I think there is force in this contention. Admittedly the father deposited a sum of Rs. 1,200 in the divorce proceedings on the faith of the undertaking given by the mother that she would claim no maintenance for the child as she was in a position to maintain the child. It now transpires however that the source of maintenance which she relied upon has dried up and that she is no more in a position to maintain the child. The father is however willing that the amount deposited in the civil case should be appropriated for the maintenance of the child in monthly instalments, thus varying to that extent the agreement entered into by him in the divorce proceedings. The mother, I find, in fact applied to the learned District Judge for an order of payment of the entire sum but later did not press the application although the father was willing to have the amount transferred to these proceedings to enable the order of maintenance made against him to be executed on that fund.

In these circumstances it seems to me that the proper order to make is that the Magistrate's order should remain intact but that the sum of Rs. 1,200 should be withdrawn by the applicant-respondent, the mother, at the rate of Rs. 30 a month from 6th July, 1953, the date from which the order of the Magistrate operates, and that whether by actual withdrawal or by a notional appropriation at that rate, the fund in Court together with the interest gets exhausted, the father should thereafter make payments in terms of the order. On a rough calculation I find that the fund will get exhausted by January or February 1958 so that the order in this case can be executed against the defendant from February or March 1958. Till then no application for execution of the order can be allowed. The present order will not debar the applicant from making an application for enhanced maintenance if she can satisfy

¹ (1943) 45 N. L. R. 26.

the Magistrate that circumstances have so altered that such an order should in the interests of justice be made. I also note that in the divorce proceedings the Decree Nisi has not yet been made absolute. The order therein as to alimony in favour of the child may be modified on the application of the parties so as to give effect to the order in these proceedings.

The appeal is dismissed and as each party has partially succeeded I make no order as to costs.

Appeal dismissed.
