

1939

Present : de Kretser J.

ARYANAYAGAM v. THANGAMMA.

494—M. C. Jaffna, 6,205.

Maintenance—Order of District Court making provision for maintenance of children—Bar to proceedings under Maintenance Ordinance.

An order made by the District Court in the exercise of its matrimonial jurisdiction making provision for the maintenance of the children of the marriage operates as a bar to proceedings for their maintenance under the Maintenance Ordinance.

THIS was an application for maintenance of children brought by the mother, the applicant-respondent, against the defendant, their father. The Court allowed the application. The question argued in appeal was whether an order made by the District Court in the exercise of its matrimonial jurisdiction, making provision for the maintenance of children, operates as a bar to proceedings under the Maintenance Ordinance for their maintenance by the mother of the children against their father.

S. Nadesan, for defendant, appellant.—The decision in *Lamehamy v. Karunaratne*¹, does not apply to a case where maintenance is claimed on behalf of a legitimate child between whose parents an action for judicial separation or for dissolution of marriage or for declaration of nullity of marriage is pending before a District Court. In such a case the District Court has jurisdiction to award maintenance under section 619 to section 622 of the Civil Procedure Code.

In this case the District Judge has awarded maintenance under section 619 of the Civil Procedure Code. Maintenance is granted to the child, though the application for it is made by the mother. If the District Judge considered it desirable he could have ordered that the maintenance amount should be paid to some other person on behalf of the child.

The liability to pay maintenance to a child is a civil liability and the Maintenance Ordinance provides a speedy remedy for enforcing this liability—see *Eina v. Eraneris*²; *Subaliya v. Kannangara*.³

Unlike in India where the provisions regarding maintenance are part of the Code of Criminal Procedure, in Ceylon these provisions are embodied in a separate Ordinance. The Magistrates' Courts really exercise a civil jurisdiction when they act under the Maintenance Ordinance.

The mother in making an application under the Maintenance Ordinance acts on behalf of a child.

Whether an order for maintenance in respect of a child is made by the District Judge under section 619, Civil Procedure Code, or by the Magistrate under the Maintenance Ordinance, the real parties to such orders are the child and the father, and the matter adjudicated upon in both cases is the claim of the child for maintenance and both Courts exercise a civil jurisdiction. Hence the plea of *res judicata* is available to the appellant.

¹ 22 N. L. R. 289.³ 4 N. L. R. 121; 12 N. L. R. 263.² 4 N. L. R. 4.

In India it has been held "that a woman is not entitled to an order from a Magistrate when a decree for maintenance obtained by her in a civil Court is in force"—(see *Sohoni Indian Code of Criminal Procedure*, p. 1034, section 21).

In Ceylon the case would be stronger as the Magistrate exercises a civil jurisdiction in maintenance cases.

H. W. Thambyah (with him *A. C. Nadarajah*), for appellant, respondent.—Judgment in one action operates as *res judicata* in another case only between the same parties or their privies—(see *Gunaratne v. Punchi Banda*¹ (*Spencer Bower on Estoppel*, para. 167, 1923 Edition.)

In the District Court the parties are husband and wife. In this maintenance case, a claim is made on behalf of the children. The wife only makes an application on behalf of the children. Any one could make the application on behalf of a minor child—see *Girigoris v. Don Jacolis*². Hence there are really no parties, as we understand the term in a civil case. At the most, it is an action between the father and the minor children. Hence decree of the District Court does not operate as *res judicata*.

Where a father neglects to maintain his legitimate child the cause of action is a continuing one.

A previous order in a maintenance case where the father is ordered to pay a lump sum was held not to be *res judicata* in a subsequent maintenance action *Hinihamy v. Gunawardene*³. In the District Court case there is an alternative order to pay a lump sum. Hence for the same reason decree in the District Court case cannot be pleaded as *res judicata* in this case since the man has not paid anything under the decree in the District Court.

There must be identity of causes of action. In a divorce action maintenance is given incidentally as a relief. In a maintenance action order is made so that child may not be a charge on the public. Thus in England it has been held that an order for maintenance made under the Married Women's Summary Jurisdiction Acts is not a bar to an application for maintenance under the Poor Relief Acts. (See *Birmingham Union v. Timmins*⁴; *Guardians of Shaftesbury Union v. Brockway*⁵.) Court in which relief is asked is different and the nature of the obligation is different.

The case cited by Counsel for the appellant is not available and hence no reliance can be placed. Further it can be distinguished because in India the view is that maintenance proceedings are only ancillary to civil proceedings. But in Ceylon the Maintenance Ordinance is the only provision under which maintenance can be claimed. (See *Lamehamy v. Karunaratne*⁶.)

Cur. adv. vult.

December 13, 1939. DE KRETZER J.—

The question in this case is whether an order made by a District Court in the exercise of its matrimonial jurisdiction, making provision for the maintenance of the children of the marriage who are committed to the

¹ 29 N. L. R. 249.

² 1 C. A. R. 4.

³ 3 C. L. Rec. 161

⁴ (1918) 2 K. B. 189.

⁵ (1913) 1 K. B. 159.

⁶ 22 N. L. R. 289.

custody of the aggrieved spouse, operates as a bar to proceedings under the Maintenance Ordinance by the mother of the children against their father.

The Magistrate held that it did not, relying on the case of *Lamehamy v. Karunaratne* (*supra*), which he interpreted as meaning that all applications for maintenance must be made under the Ordinance and under the Ordinance alone. The Magistrate seems to have been of opinion that the order made in the District Court was of no value as having been made without jurisdiction. This is not so. All that was decided in that case was that the Roman-Dutch law on the subject had been superseded by the Maintenance Ordinance.

In matrimonial proceedings the District Court deals with all matters arising out of the marriage, and may provide not only for the maintenance of the children but also for their education and their custody. It is not subject to some of the restrictions which exist in the Maintenance Ordinance. The District Court need not make provision for maintenance, nor is the wife obliged to ask for an order for maintenance. The Court may make an order not in favour of the wife but in favour of some other person who is more likely to look after the interests of the children. An order therefore made by the District Court is much more advantageous to the children than one made under the Maintenance Ordinance. There is only one advantage which the Ordinance gives, and that is that pressure by way of imprisonment may be brought to bear on the father in the event of default of payment of the maintenance ordered. That is a matter which the person applying to the District Court should consider, but so long as the order of the District Court remains it is the order of a Court of competent jurisdiction and, on general principles, it ought to be a bar to separate proceedings on the same subject-matter.

Arguments and decisions based on the Poor Law in England have no application, for quite different considerations apply. Our Maintenance Ordinance follows very closely the provisions of the Indian Criminal Procedure Code on the same subject; and *Sohoni* at p. 1034 (section 21) states that a woman is not entitled to an order from a Magistrate when a decree for maintenance obtained by her in a Civil Court is in force. He quotes a case reported in 2 *Weir* 615 which is not available to me. There appears to have been a decision of the Bombay Court that when the decree of the Civil Court cannot be executed on account of insolvency proceedings the Magistrate may then act under the provisions in the Code.

If it were merely a matter of applying one of two alternative procedures for execution there could be no objection to the applicant choosing either of them. But in proceedings under the Maintenance Ordinance the Court has to consider matters which have already been dealt with by the Civil Court, and the procedure cannot therefore be applied as if it were purely ancillary.

The appeal is allowed and the order made in this case is set aside. No costs are awarded.

Appeal allowed.