RANJITH
vs.
PIYASEELI

COURT OF APPEAL.
SOMAWANSA, J. (P/CA).
WIMALACHANDRA, J.
CA (PHC) 47/2002.
HC KEGALLE 1249/REV.
MC KEGALLE 5473/M.
APRIL 27, 2005.
MAY 27, 2005.
JUNE 15, 2005.

Maintenance Ordinance, section 6 - Two applications dismissed on technical grounds - Maintenance Act, No. 37 of 1999 - Third application - Applicability of the doctrine of res judicata - Civil Procedure Code, sections 341, 184, 188, 207 and 407 - Do these provisions apply ? - Is the order made under the Maintenance Act a decree ?

The applicant respondent-respondent made an application under the Old Maintenance Ordinance praying for maintenance for her daughter. The Magistrate ordered the respondent to pay a certain sum of money. The Court of Appeal in appeal set aside the order on the ground that the respondent had not signed the application. The second application made by the respondent was dismissed on the ground that it violates the provisions of section 6, The respondent filed that third application under the new Maintenance Act. The applicant raised a preliminary objection that as the two previous applications made by the same applicant on behalf of the same child claiming maintenance from the appellant have been dismissed the respondent is not entitled to re agitate the same matter again. The Magistrate rejected the preliminary objection holding that the previous cases were dismissed on technicalities and not on the merits. The High Court affirmed the order of the Magistrate.

On appeal,

HELD:

(1) The provisions in sections 34, 207 and 406 of the Civil Procedure Code which embody the principles of *res judicata* will not apply to maintenance proceedings.

(2) The Maintenance Act does not contemplate decrees. It deals with orders. Therefore an order made under the Maintenance Act is not a decree that comes under the expression all "decrees" in section 207. Unlike in section 188 of the Code the Maintenance Act does not provide that after the judgment is pronounced a decree be drawn up by the court.

Held further :

(3) In any event none of the two previous maintenance applications were decided on merit. There was no adjudication in the two previous applications. The dismissal of the two applications on technical grounds cannot be regarded as "res judicata"

(4) In the two previous applications there were no judgments contemplated in section 184 of the Code, therefore the dismissal of the two applications will not operate as res judicata.

Per Wimalachandra, J. :

"To constitute a judicial decision a res judicata, the decision must be on merits, it must be a final decision on the merits. It appears that a decision on issues in a case rather than on procedural grounds is a decision on the merits."

APPEAL from the judgment of the High Court of Kegalle.

Cases referred to :

1. *1985 I. W. L. R. 490 at 499*
2. *Anura Perera vs. Emallano Nonis 12 NLR 1908 at 263*
3. *Herath vs. Attorney General 60 NLR 183*
4. *Samichi vs. Peiris 16 NLR 257*
5. *Bank of England vs. Vagliano Brothers 1891 AC 107, 60 LJQB 145*

Thushani Machado for respondent petitioner appellant.

Nuwanthi Dias for appellant respondent respondent.

Cur. adv. vult.

FEBRUARY 17, 2006.

WIMALACHANDRA, J.

This is an appeal from the order dated 22.01.2002 of the learned High Court Judge of the High Court of Sabaragamuwa Province, holden in Kegalle, upholding the order of the learned Magistrate of Kegalle made on 21.03.2001. Briefly, the facts are as follows :

The applicant-respondent-respondent (respondent) made an application, bearing No. 75299/89 on 08.09.1987 under the old Maintenance Ordinance of 1899, praying for maintenance for her daughter born on 09.02.1987, alleging that her daughter was born out of a relationship she had with the appellant. The learned Magistrate after inquiry ordered the appellant to pay a sum of Rs. 350/- per month as maintenance. The appellant appealed against that order to the Court of Appeal. The Court of Appeal allowed the appeal on the ground that the respondent had not signed the application made by her in the Magistrate's Court as required by law. Thereafter the respondent filed a second application on 08.11.1991 bearing No. 97673/91. The learned Magistrate dismissed the application on the ground that the application violates the provisions of section 6 of the Maintenance Ordinance No. 19 of 1889. The learned Magistrate dismissed the aforesaid second application of No. 97673/91 instituted on 08.11.1991 on the ground that the application has not been filed within 12 months of the birth of the child and that the respondent had not established that the appellant had maintained the child at any time within 12 months next after the birth of that child in terms of section 6 of the old Maintenance Ordinance. In his order the learned Magistrate has stated as follows :

"මුල් නඩුවේදී දැක්වෙන කරුණු අනුව මෙම නඩුවේ ඉදිරිපත් වී ඇති කරුණු අනුව එම නඩුවේදී වගඋත්තරකරු විසින් 1986.06.25 වැනි දින සිට දරුවාගේ සහ ඇයගේ නඩත්තුව ගෙවීම පැහැර හැර ඇති බව ද ප්‍රකාශ කර ඇත. දරුවා ඉපදී ඇත්තේ 1987.02.09 වන දින බව හෙළිදරවු වන අතර නඩත්තු ආඥාපනතේ 06 වන වගන්තියේ ප්‍රතිපාදන සලකා බැලීමේදී ඉල්ලුම්කාරියට මෙම දරුවාගේ ලැබීමෙන් පසුව ටික කාලයක් දරුවා නඩත්තු කරන ලද්දේය යන ස්ථාවරය පෙර පැවති නඩුවේ ඇය විසින් දරන ලද ස්ථාවරය සලකා බැලීමේදී කළ නොහැක්කේ බව තීරණය කිරීමට සිදුවෙයි. ඒ අනුව ඉල්ලුම්කාරියගේ ඉල්ලීම නිශ්ප්‍රභා කරමි."

The respondent appealed against the order of the Magistrate to the High Court, which upheld the said order. Thereupon the respondent filed the present application bearing No. 5473/M under the new Maintenance Act No. 37 of 1999. At the inquiry into this application in the Magistrate's Court, the appellant raised the preliminary objection that as the two previous applications No. 75299/89 and No. 97673/91 made by the same applicant on behalf of the same child claiming maintenance from the appellant have been dismissed, the respondent is not entitled to reagitate the same matter. The learned Magistrate by his order dated 21.03.2001 rejected the preliminary objection, holding that the previous cases were dismissed on technicalities and not on the merits. The appellant thereafter appealed the order of the Magistrate to the High Court of Kegalle. The High Court affirmed the order of the Magistrate by its order dated 22.01.2002. The appellant has filed this appeal against the aforesaid order of the learned High Court Judge.

In the present application No. 5473/2000, the learned Magistrate held that the provisions of the new Maintenance Act, No. 37 of 1999, had done away with time limits and technicalities with regard to the filing of an

application for maintenance for an illegitimate child, and fixed the matter for inquiry.

The question that arises is whether the two earlier applications were decided on their merits. It is obvious that the Court of Appeal has dismissed the first application bearing No. 75299/89 mainly on the ground that the respondent had not signed the application and therefore the Court of Appeal had not considered the application on its merits. With regard to the second application bearing No. 97673/91, the learned Magistrate had not decided the application on its merits but dismissed the application on the ground that it had not been made within 12 months of the birth of the child and/or that the respondent had failed to establish that the appellant had maintained the child at any time within 12 months after the birth of that child in terms of section 6 of the old Maintenance Ordinance. In making this order the learned Magistrate has commented on the contradictory nature of the statements with regard to dates in the first application and in the second application as to the period of cohabitation between the respondent and the appellant and the second application has not been made within 12 months from the birth of the child or that the respondent had failed to establish that the appellant had maintained the child at any time within 12 months after the birth of that child. Apart from this, there had been no inquiry and the Court had not called upon the parties to lead evidence. Before reaching that stage the Court had decided the application on a preliminary point raised by the appellant. In these circumstances I am of the view that the Court had not decided the maintenance application bearing No. 97673/91 on its merits.

Accordingly, the two previous maintenance applications filed by the appellant were not decided on the merits. To constitute a judicial decision a *res judicata*, the decision must be on the merits. It must be a final decision on the merits. As regards decision on merits, Spencer Bower in the "Doctrine of Res Judicata" 3rd edition at page 173, quotes from Lord Brandon (1985) 1 W. L. R. 490[1] (House of Lords) at 499.

".....a decision on procedure alone is not a decision on the merits. Looking at the matter positively a decision on the merits is a decision which establishes certain facts as proved or not in dispute, states what are the relevant principles of law applicable to such facts, and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned".

It appears that a decision on issues in a case rather than on procedural grounds is a decision on the merits.

None of the two previous maintenance applications filed by the respondent were decided on the merits. It is to be observed that there was no adjudication in the two previous maintenance applications. The

dismissal of the two applications on technical grounds cannot be regarded as *res-judicata*. Moreover, in the two previous maintenance applications there were no judgments in the sense contemplated in section 184 of the Civil Procedure Code. Therefore the dismissal of the two applications do not operate as *res-judicata*.

The provisions in section 34,207 and 406 of the Civil Procedure Code embrace the principles of *res-judicata*. It is to be noted that the procedure adopted with regard to applications under the Maintenance Ordinance (now under the Maintenance Act, No. 33 of 1999) is not according to the provisions of the Civil Procedure Code. Shiranee Ponnambalam in Law and Marriage Relationship in Sri Lanka" 1982 publication, at page 274 states as follows :

"It has been held in *Anura Perera Vs. Emaliano Nonis* [2] it is not possible 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."

Basnayake, C. J. in the case of *Herath Vs. Attorney-General*[3] held that the whole of our law of *res-judicata* is to be found in sections 34,207 and 406 of the Civil Procedure Code.

Basnayake, C. J. observed that in our law the subject of *res-judicata* appertains to the province of Civil Procedure properly so called. His Lordship considered the previous judgments of the Supreme Court on this question and specifically made reference to the case of *Samichi vs. Pieris*[4] which was heard by a bench of three judges where two of the judges refused to uphold the contention that the whole of our law of *res-judicata* is to be found in sections 34, 207 and 407 of the Civil Procedure Code. The dissenting judge, Pereira, J. took the view that our law of *res-judicata* is in the Civil Procedure Code and that we cannot go outside it.

Basnayake, C. J. commenting on the decision in *Samichi vs. Pieris* (*supra*) made the following observations (at 219) :

"With the greatest respect to the two most eminent judges who formed the majority I find myself unable to agree that theirs is the proper approach to the interpretation of a Code. The principles of interpretation applicable to a Code are stated in the case of *Bank of England v. Vagliano Brothers.*[5] In that case Lord Halsbury stated at 120 : I am wholly unable to adopt the view that where a statute is expressly said to codify the law, you are at liberty to go outside the Code so created, because before the existence of that Code another law prevailed."

Accordingly, the provisions in sections 34,207 and 406 which embody the doctrine of *res-judicata*, will not apply to maintenance proceedings.

In any event, the Maintenance Act does not contemplate "decrees". It deals with orders. Therefore an order made under the Maintenance Act is not a "decree" that comes within the expression all decrees in section 207 of the Civil Procedure Code. Unlike in section 188 of the Civil Procedure Code, the Maintenance Act does not provide that after the judgment is pronounced a decree be drawn up by the Court.

Basnayake, C. J. in *Herath Vs. Attorney-General* (*supra*) after an exhaustive analysis of section 207 held that this section will apply only to a decree after there had been an adjudication on the merits of a suit.

In the circumstances, it appears that an order made under the Maintenance Act does not come within the meaning of "decree" as contemplated in section 206 of the Civil Procedure Code.

For these reasons, I see no reason to interfere with the order made by the learned Magistrate on 21.03.2001 and the order made by the learned High Court Judge dated 22.01.2002. The objections raised by the appellant are over-ruled and the proceedings will be remitted to the Magistrate's Court of Kegalle for the learned Magistrate to proceed with the inquiry with regard to the application bearing No. 5473/Maintenance made by the respondent. The respondent will be entitled to the costs of this appeal and also the costs of the appeal in the High Court. The appeal is dismissed with costs.

ANDREW SOMAWANSA, J. (P/CA) — *I agree.*

Appeal dismissed.

Editor's note : The Supreme Court in SC Spl. L. A. 73/2006 on 27.10.2006 refused Special leave to the Supreme Court.