

1960

*Present : Weerasooriya, J.*

PODINONA, Appellant, and RANASINGHE, Respondent

*S. C. 1160—M. C. Teldeniya, 2337*

*Maintenance Ordinance (Cap. 76)—Section 14—Issue of summons on defendant—  
Failure to examine the applicant previously on oath—Proceedings become null  
and void.*

In an application for maintenance under the Maintenance Ordinance the failure to examine the applicant on oath or affirmation, or duly to record such examination, prior to the issue of summons on the defendant renders the proceedings null and void. In such a case the applicant herself is entitled to challenge the validity of an order dismissing her application.

**A**PPEAL from an order of the Magistrate's Court, Teldeniya.

*M. S. M. Nazeem, with M. T. M. Sivardeen, for applicant-appellant.*

*K. Sivasubramaniam, with D. S. Nethsinghe, for defendant-respondent.*

*Cur. adv. vult.*

October 7, 1960. WEERASOORIYA, J.—

This is an appeal from an order of the Magistrate of Teldeniya dismissing an application for maintenance filed by the appellant against the respondent who is her husband.

The point has been taken on behalf of the appellant that the procedure adopted by the Magistrate prior to the issue of summons was in contravention of section 14 of the Maintenance Ordinance (Cap. 76) in that he failed to examine the appellant on oath or affirmation, or duly to record such examination. Relying on the recent decision of this Court in *Rupasinghe v. Somawathie*<sup>1</sup>, learned counsel submitted that the failure to comply with section 14 has rendered the proceedings, including the order dismissing the application for maintenance, a nullity and that the case should, therefore, be sent back for fresh proceedings in accordance with law.

It was because of the conflicting views expressed in *Namasivayam v. Saraswathy*<sup>2</sup> and *Sebastian Pulle v. Magdalene*<sup>3</sup> (each of which is a decision of a single Judge) that the case of *Rupasinghe v. Somawathie (supra)* was referred to a bench of two Judges. The appellant in that case was the respondent to an application for the payment of maintenance, and the appeal was from an order requiring him to pay maintenance. There too the Magistrate failed to comply with the provisions of section 14, and in appeal it was held that the non-compliance was fatal to the order and rendered it null and void.

Mr. Nethsinghe for the respondent did not dispute that there has been a failure in the present case to comply with section 4, but he submitted that at the most it is an irregularity which does not affect the validity of the order dismissing the application for maintenance. I do not think however, that such an argument is tenable in view of the decision in *Rupasinghe v. Somawathie (supra)*. While, if I may say so with respect, I am unable to agree with that decision, it is, nevertheless, binding on me and the present appeal has to be disposed of on that basis.

Mr. Nethsinghe also submitted that the *ratio decidendi* of that case is inapplicable to the present case as the appellant, who is the party who initiated the proceedings for maintenance and practically acquiesced in the Magistrate's non-compliance with the provisions of section 14, should not now be allowed to challenge the validity of the order made in those proceedings. But if the result of such non-compliance is to render those proceedings null and void, I do not see that consent or acquiescence on the part of the appellant can possibly cure the defect.

The order appealed from is declared null and void, and the case is sent back for fresh proceedings to be taken before another Magistrate in accordance with law. There will be no order as regards costs.

*Order set aside.*

<sup>1</sup> (1959) 61 N. L. R. 457.

<sup>2</sup> (1949) 50 N. L. R. 333.

<sup>3</sup> (1949) 50 N. L. R. 494.