

Present : Bertram C.J. and Schneider J.

1924.

PINCHOHAMY v. AKORIS APPU.

23—P. C. Matara, 22,861.

Maintenance—Competency of Court to award costs—Ordinance No. 19 of 1889, s. 9.

A Court has no power to award costs in maintenance cases.

THIS was a reference to the Supreme Court by the Police Magistrate of Matara under section 353 of the Criminal Procedure Code. The question put by the learned Police Magistrate arose in a maintenance case and was as follows:

“ Can a respondent be committed to jail for non-payment of the applicant’s costs in the same manner that he can be committed for non-payment of arrears of maintenance ? ”

J. Joseph, for the appellant.

M. W. H. de Silva, C.C., for the Crown.

October 3, 1924. BERTRAM C.J.—

This is a reference which has been made to this Court by a learned Police Magistrate under the provisions of section 353 of the Criminal Procedure Code, and in accordance with an order by our brother Jayewardene it has been set down for argument before two Judges.

The question arises out of a maintenance case in which an appeal was brought to this Court, and on that appeal an order was made allowing the appeal, and directing that the costs be paid by the respondent both in this Court and in the Court below. The question propounded by the learned Magistrate was “ Can the respondent be committed to jail for non-payment of the applicant’s costs in the same manner that he can be committed for non-payment of arrears of maintenance ? ”

The question whether this Court on appeal under the Maintenance Ordinance is competent to direct that costs shall be paid in respect either of proceedings in this Court, or of proceedings in the Court below, does not strictly arise in this reference. But that question is so closely connected with this reference that it is necessary for us to examine it. The nature of maintenance proceedings has been carefully explained in the case of *Anna Perera v. Emaliano Nonis*,¹ and effect has been given to one of the principles laid

¹ (1908) 12 N. L. R. 263.

1924.

BERTRAM
C. J.Pinchohamy
v. Akoris
Appu

down in that case by a decision of three Judges of this Court (*Fernando v. Fernando*¹). The principle to which I refer is that the Maintenance Ordinance only incorporates such provisions of the Criminal Procedure Code as are expressly or by implication therein referred to. We carried this principle so far in *Fernando v. Fernando* (*supra*) that we held that there was no time limit to an appeal under the Maintenance Ordinance. Both in that judgment and in the judgments given in *Anna Perera v. Emaliano Nonis* (*supra*), the opinion was very explicitly expressed that the maxim *expressio unius exclusio alterius* prevented our Courts from applying in proceedings under the Maintenance Ordinance any provision of the Criminal Procedure Code, not expressly or by implication incorporated. I see no logical escape from the further conclusion that section 352 of the Criminal Procedure Code does not apply to proceedings under the Maintenance Ordinance. It would appear, therefore, that the practice which we have adopted of awarding costs in appeals under the Maintenance Ordinance has arisen by an oversight, and we appear to have no general power under any of the Ordinances regulating our proceedings to award costs. Nor can it be suggested that we have any inherent powers for that purpose. Even, however, if we held that this Court has power to award costs in maintenance proceedings, it would appear that there is no provision in the Maintenance Ordinance which allows those costs to be enforced by process of imprisonment. Section 9 of the Maintenance Ordinance says nothing about costs. The form of warrant provided in the schedule does not include any reference to costs. This is all the more marked when we bear in mind that in the corresponding provisions under the laws of England costs are expressly referred to. The answer to the inquiry of the learned Magistrate must, therefore, be in the negative.

It appears, however, that the law in regard to this matter is defective, and that it requires the attention of the legislature. On the one side there is no time limit for an appeal under the Maintenance Ordinance. On the other hand, a person who has to invoke the powers of the Court to obtain justice is not allowed to be reimbursed necessary costs. A person who is unjustly brought into the Police Court on a claim for maintenance cannot recover his necessary costs, and neither party can recover costs of any necessary appeal.

SCHNEIDER J.—I agree.

¹ (1921) 23 N. L. R. 31.