

1959 Present: Basnayake, C.J. and E. D. de Silva, J.

RUPASINGHE, Appellant, and SOMAWATHIE, Respondent.

S. C. 365—M. C. Gampaha. 29720 B

Maintenance—Issue of summons on defendant—Procedure prior to it—Requirement of oral examination of applicant—Maintenance Ordinance, ss. 13, 14—Criminal Procedure Code, ss. 298, 299.

When, in an application for maintenance under the Maintenance Ordinance, the applicant is examined under section 14 for the purpose of issuing summons, the failure of the Magistrate to record the applicant's deposition in conformity with the requirements of sections 298 and 299 of the Criminal Procedure Code is a fatal irregularity.

Sebastian Pillai v. Magdalene (1949) 50 N. L. R. 494, overruled.

APPEAL from a judgment of the Magistrate's Court, Gampaha.

Colvin R. de Silva, with M. L. de Silva and H. Mohideen, for Respondent-Appellant.

F. W. Obeyesekere, for Applicant-Respondent.

December 11, 1959. BASNAYAKE, C.J.—

This appeal comes before a Bench of two Judges on an order made by me under section 48A of the Courts Ordinance on the question of law arising for decision herein being reserved under section 48 of the Courts Ordinance by my brother Sinnetaimby. The question for decision is whether *Namasivayam v. Saraswathy*¹ or *Sebastian Pillai v. Magdalene*² is correct. In the former case it was held that the requirement of section 14 of the Maintenance Ordinance is a condition precedent to the issue of summons and that any proceedings taken without that requirement being observed are rendered invalid. We are of the opinion that the decision in *Namasivayam v. Saraswathy* is right and that the decision in *Sebastian Pillai v. Magdalene* is wrong. In our view it is an imperative requirement that proceedings under the Maintenance Ordinance should commence with an application in writing as prescribed by section 13 of that Ordinance. Upon such an application being made the Magistrate is bound by section 14 to commence the inquiry by examining the applicant on oath or affirmation and such examination must be duly recorded. If after such examination there is in the judgment of the Magistrate not

¹(1949) 50 N. L. R. 333.

²(1949) 50 N. L. R. 494.

sufficient ground for proceeding he is empowered by that section to make order refusing to issue a summons. An order to issue summons may be made only if upon the deposition of the applicant the Magistrate forms the opinion that there is sufficient ground, and is designed to protect innocent persons from the ignominy and vexation of having to come into Court to answer groundless accusations.

In the instant case there is an application in writing which reads :

“ On this 26th day of April 1958.

The applicant abovenamed complains to this Court that the defendant abovenamed did at Paramulla, within the jurisdiction of this Court, for the past two months having sufficient means failed and neglected to maintain his illegitimate child aged two months named Sirimawathie by the applicant and hath thus become liable for maintenance for the said child under Section 3 of Ordinance No. 19 of 1889.

Sgd S. A. Somawathie (in Sinhalese)
Applicant.

Drawn by me

Sgd A. A. L. Gunaratne
Proctor for Applicant.

List of Witnesses :—

1. The Village Headman of Paramulla, Veyangoda.”

In the same document the following statement occurs below the written application :—

“ I, Subasinghe Aratchilage Somawathie, Paramulla, 24 years, affirm I am the Applicant abovenamed. That about a year ago the Defendant started visiting me. He promised to marry me, and on that promise we lived together as husband and wife. On the 22nd February 1958 I gave birth to the child named Sirimawathie at the Wathupitiwala Hospital. The Defendant is the father of the said child. Since the birth of the child the Defendant failed and neglected to maintain the child. The Defendant is a Government servant drawing about Rs. 225 per month. I claim Rs. 50 per month as maintenance for the child.

Applicant : Sgd S. A. Somawathie
(in Sinhalese)

(Initials)
Addl Magistrate.”

The following order occurs next :—

“ Plaintiff accepted. Issue summons on the Defendant for 24.5.58.

(Initials)
Addl Magistrate.”

The application, the statement, and the order of the Magistrate are all on the face of one sheet of paper and appear to have been typed at the

same time in the Proctor's office and submitted to the Magistrate for his signature. The statement does not satisfy the requirements of section 14. There should have been an oral examination of the applicant by the Magistrate in order to determine whether in his judgment summons should issue.

The deposition of an applicant who is examined under section 14 must be recorded as prescribed in section 298 of the Criminal Procedure Code and read over to the witness as required by section 299 (1) of that Code and the other requirements of that section must be complied with. The requirements of section 14 and the provisions of the Code have not been complied with. That non-compliance is fatal to the order made by the Magistrate and renders it null and void.

The appeal is allowed and the proceedings after the date of the application are declared null and void.

The applicant may now if she desires to continue the proceedings submit herself to be examined by the Magistrate.

There will be no costs of this appeal.

DE SILVA, J.—I agree.

Appeal allowed.

