

CHIMAN LAL

A

v.

PAN BAI

[SUPREME COURT, 1978 (Mishra J.), 23rd November]

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Appellate Jurisdiction

Family Law—ancillary relief—maintenance of children—whether power to issue a warrant of apprehension following dissolution of the marriage in respect of alleged breach of a maintenance order made before the divorce—Maintenance and Affiliation Act 1971 Ss. 8(1), 10—Matrimonial Causes Ordinance 1968 S. 56.

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The appellant (father) was the subject of an order for maintenance of the children of the family made against him in the Magistrate's Court prior to the divorce proceedings. Some years later the respondent (mother) obtained a warrant of apprehension against the father whom she alleged was about to leave the country.

D The father appealed contending that following dissolution of the marriage he was no longer the mother's husband and accordingly the court had acted without jurisdiction.

Held: An undischarged order for maintenance made by the Magistrate's Court prior to the commencement of divorce proceedings continues in force for all purposes including enforcement notwithstanding dissolution of the marriage.

E Accordingly the Magistrate's Court had had jurisdiction to issue the warrant.

Cases referred to:

Bragg v. Bragg [1920] P. 20

Wood v. Wood [1957] 2 W. L. R. 826

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Prest v. Prest [1950] P. 63

Abson v. Abson [1952] P. 55

Appeal against order to issue warrant of apprehension made in the Magistrate's Court.

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K. C. Ramrakha & A. Singh for the appellant

A. B. Ali for the respondent

MISHRA J.:

H

Appellant was arrested at Suva under a warrant issued by the Magistrate, Labasa, and was later released by the Magistrate, Suva on bail to appear at Labasa on 10th October 1978.

The Magistrate Labasa acted on an affidavit filed by respondent Pan Bai d/o Bhowan Kara who sought the warrant. The affidavit is in following terms: A

"I Pan Bai d/o Bhowan Kara, of Nasea, Labasa in the Dominion of Fiji, Domestic Duties make oath and say as follows:

1. That I am the applicant herein.
2. That I know from my own knowledge that the defendant Chiman Lal holds the status of a United States National together with his current legal wife and children. B
3. That I have received information by way of a letter and do verily believe that the wife and children of the Defendant have already left and have arrived into United States.
4. That I have received information and do verily believe that the Defendant is due to leave for the United States of America on 30th August, 1978. C
5. That further to such receipt of information, my brother checked with an airline and it was confirmed that the Defendant is booked to leave on 30th August 1978 but that this information was disclosed on that basis that I am not to name the airline or officer giving the information. D
6. That I pray for an Order restraining the defendant from leaving the country pending the determination of my application."

Details of the application referred to in paragraph 6 of the affidavit are not known to this Court but Mr Ali for respondent Pan Bai d/o Bhowan Kara concedes that the application in question had been made under the Maintenance and Affiliation Act, 1971 and that the application for the issue of a warrant was made under Section 10 of that Act. E

Section 10 of the Act reads:

"Any Magistrate upon being satisfied on oath that any husband has deserted his wife or that any child has been deserted by his father or mother or that any husband or father or mother is about to depart from Fiji or to proceed to a remote part within Fiji to defeat the provisions of this Part of this Act or any order made in pursuance thereof may issue a warrant for the apprehension of such husband or father or mother." F

The wording of the warrant also shows that the warrant was applied for and issued in pursuance of this section.

Respondent's Counsel concedes that the marriage between appellant and respondent was dissolved in 1971 and appellant is not now respondent's husband. It is also not in dispute that an Order for Maintenance had been made against appellant by a magistrate before the divorce proceedings and has remained in force to date without any challenge from appellant. G

To what extent the learned magistrate who issued the warrant was made aware of the marital status of respondent is not clear but paragraph 2 of the affidavit which H

A refers to "his current legal wife" would have indicated to him that respondent herself was no longer appellant's wife.

The sole question before me is:

B Does Section 10 of the Maintenance and Affiliation Act 1971 empower the issue of warrant at the application of a divorced woman for the arrest of her ex-husband who is required to pay maintenance under an Order made in pursuance of that Act before the dissolution of marriage?

Mr Ramrakha submits that no such power is given by that section of the Act which is designed solely for the protection of married women's rights. Mr Ali submits that Section 10 should be given an extended meaning by the Court to include divorced "wives" who have subsisting rights under maintenance orders made in pursuance of the Act.

C Neither counsel has produced any authority in support of his contention.

It is not in dispute that the Supreme Court, when it dissolved the marriage, made no order as to the maintenance of respondent. It merely stated that the Magistrate's Order already made in that regard was quite satisfactory. Payment of maintenance has continued under the Magistrate's order since the dissolution of the marriage.

D The Matrimonial Causes Ordinance 1968 is based almost exclusively on the Matrimonial Causes Act 1959 of Australia. In Australia, by virtue of Section 8 of their Act, an Order for maintenance made by a Magistrate prior to divorce proceedings would cease to have effect upon dissolution of marriage. Thereafter, it can be enforced only as to arrears. (See also *Marriage and Divorce* by Joske 4th Edition P 67). For that reason, Section 68 of the Australian Act requires that all ancillary relief sought by the parties must be applied for under the petition for dissolution and the Divorce Court, so far as practicable must make all the necessary orders at the time it grants the decree. Section 56 of the Fiji Ordinance is identical with Section 68 of the Australian Act but Section 8 of the Australian Act which makes existing maintenance orders inoperative after dissolution of marriage has been omitted from the Fiji Ordinance. Whether the omission was intentional or inadvertent is irrelevant. This appeal must be considered on the basis that there is no specific provision in the Fiji Ordinance whereby a magistrate's order for maintenance granted during the subsistence of a marriage becomes inoperative after its dissolution.

The order in question was made under the Maintenance and Affiliation Act 1971 of Fiji. Part I and II of that Act are based on English legislation the latest of which would appear to be the Matrimonial Proceedings (Magistrates Courts) Act 1960. The older English Acts which Fiji followed in its Separation and Maintenance (Summary Jurisdiction) Ordinance (now repealed and replaced by the Maintenance and Affiliation Act, 1971) are the Summary Jurisdiction (Married Women) Act 1895 and the Summary Jurisdiction (Separation and Maintenance Act) 1925. Section 7(4) of the Matrimonial Proceedings (Magistrates Courts) Act, 1960 makes it clear that an order made by a Magistrate's Court for maintenance of a spouse, unless revoked, continues in force after dissolution of the marriage but ceases to have effect upon the remarriage of the spouse in whose favour it was made. No such provision exists in the Fiji Act of 1971. The Courts in England have, however, always recognised that such an order survived dissolution of marriage even under the English Act of 1895 and that the Magistrate having the necessary jurisdiction could

continue to deal with applications from the divorced wife or husband for the alteration, variation or discharge of the order despite the fact that the applicant was no longer a "wife" or a "husband". A

Bragg v Bragg [1925] P. 20 had to deal with precisely this situation which arose in an appeal from the Magistrate's refusal to discharge an order after dissolution of marriage. Horridge J said (p.26):

"The question in this appeal is whether or not there is any provision in the Summary Jurisdiction (Married Women) Act 1895 which limits the operation of orders made under S. 5 to the period of existing marriage. I can find no such words. In S. 5(c) the provision that 'The husband shall pay to the applicant personally' is merely defining the husband about the time of the application." B

The Court there held that a Maintenance Order made by a Magistrate is not ipso facto discharged by dissolution of marriage. C

In *Wood v Wood* [1957] 2 W.L.R. 826 the Court of Appeal followed *Bragg v Bragg* (supra) and held further C

"That in considering a maintenance order which had survived a divorce the court's discretion was not limited to discharging it on being informed of the dissolution of the marriage, but the Court had power to vary or to discharge it under Section 7 of that Act". D

Section 7 referred to above is substantially the same as Section 8(1) of the Maintenance and Affiliation Act, 1971 of Fiji.

The principle laid down in *Bragg v Bragg* (supra) has in some cases created some curious difficulties such as in *Prest v Prest* [1950] P. 63 where, after the dissolution of their marriage, the divorced spouses had started living together again and the issue was whether it amounted to resumption of "cohabitation" for the purposes of the Maintenance Order made by a magistrate prior to the dissolution of the marriage; or as in *Abson v Abson* [1952] P.55 where the divorced "wife" had had sexual intercourse with another man and the question arose whether it could amount to "adultery" on her part for the purposes of an application relating to a maintenance order in her favour. In *Abson v Abson* (supra at P. 63) Lord Merriman P. said:— E

"In other words, my view of the matter is that the moment the issue appeared, at the very outset of the case, the justices should have said, "This is not a case for us to keep this order alive. Never mind what the facts are proved to be; there is a charge of adultery against one who was a married woman when the order was obtained, and is now a divorced woman. That raises all the complications inherent in the line of authorities beginning with *Bragg v Bragg*". F

The Court, however, did not depart from *Bragg v Bragg*. It acted on the principle that the Magistrate did have the power to deal with the application for a discharge of the Order. G

It may well be that the Australian approach to the issue of whether or not a maintenance order should survive the dissolution of marriage is more logical but in the absence of any statutory provision such as that contained in Section 8 of the Australian Matrimonial Causes Act of 1959, this Court, in my view, must consider itself bound by the decisions in *Bragg v Bragg* and *Wood v Wood* (supra). H

- A Coming now back to the facts of this appeal, the maintenance order in question, whether made before or after the coming into force of the Maintenance and Affiliation Act 1971, must, by virtue of section 33 of that Act, be regarded as an order made "in pursuance of" the Act for the purposes of Section 10 thereof.

Section 9 of the Act states:

- B "Before a magistrate may make any order under the provisions of this Part of this Act he shall satisfy himself upon evidence produced by the applicant of the fact of the marriage."

The orders which can be made under Part II of the Act are specified under sections 4 and 5 of the Act. It is not suggested by either counsel that the marriage did not subsist, or the fact of the marriage was not enquired into at the time the Maintenance Order was made.

- C Appellant and respondent were husband and wife under that Order. Power to alter, vary or discharge the order remains in the Magistrates Court having jurisdiction in the matter under Section 8(1) of the Act until the order is discharged. Until then, appellant and respondent remain "husband" and "wife" for the purposes of the order in the light of *Bragg v Bragg* (supra).

- D Section 10 provides for the enforcement of the order. If the Magistrate's jurisdiction continues under Section 8(1) of the Act for the purposes of alteration, variation and discharge it must, in my view, continue for the purposes of enforcement as well. If he was satisfied on oath that the appellant was about to depart from Fiji to defeat an order made in pursuance of the provisions of Part II of the Act, he was within his powers in issuing the warrant. The wording of the warrant could perhaps have been more precise but this would not affect its validity.

- E The remaining grounds of appeal relate to adequacy and veracity of the contents of the affidavit filed by respondent. Mr Ramrakha complains that the affidavit did not reveal the source of respondent's information and that there was no evidence before the Magistrate that appellant was in fact about to leave Fiji. Mr Ali, on the other hand, states that appellant has in fact gone to the United States and is there now. The source of respondent's information was, therefore, correct anyway and the learned magistrate acted properly in accepting the affidavit. Be it as it may, these grounds themselves have little to do with the validity of the warrant which was issued within the powers of the Magistrate. If the affidavit is proved to be false, appellant would no doubt have other remedy in law. The appeal is dismissed with costs.

Appeal dismissed.