AJIT NARAYAN

A

v.

RENUKA SHARMA

[COURT OF APPEAL, 1978 (Gould V. P., Henry J. A., Spring J. A.) 8th, 30th November]

B

Civil Jurisdiction

Family Law—Practice and Procedure—whether necessary to hear evidence on oath before ordering interim maintenance—how far necessary to conduct examination as to means before making order—Maintenance and Affiliation Act 1971 *s.* 14.

C The wife (respondent) complained that the husband (appellant) had deserted her. She sought ancillary relief including maintenance for the child of the family. Prior to the hearing of the complaint the parties appeared before the Resident Magistrate who ordered the husband to pay interim maintenance for the support of the child. The parties did not give evidence on oath and there was no detailed examination of means.

D *Held:*

1. Although the Court must allow the parties an opportunity to be heard there was no statutory requirement that the Court should hear evidence on oath before making an interim order for maintenance.

2. The object of the limitation on quantum contained in Section 14(1) was to E avoid the risk of excessive orders, it did not require that a detailed examination of means precede the making of an interim order for maintenance.

Cases referred to:

Bould v. Bould [1967] 1 All E. R. 1128

Robbins v. Robbins [1970] 2 All E. R. 742

F Appeal for the Supreme Court in its appellate jurisdiction against an order for interim maintenance made in the Magistrate's Court.

K. C. Ramrakha for the appellant

M. S. Sahu Khan for the respondent

Judgement of the Court (read by Gould V. P.):

G

This is an appeal from a judgment of the Supreme Court at Lautoka sitting in appellate jurisdiction in relation to an order made in the Magistrate's Court under the Maintenance and Affiliation Act, 1971. Being a second appeal it is confined to questions of law.

On the 2nd February, 1978, the present respondent swore a complaint before a H magistrate alleging various matrimonial offences by the appellant, described

therein as her husband. A summons was duly issued and the parties appeared in person before a magistrate on the 16th February, 1978. The magisterial record of these proceedings reads:— A

"Complainant: present

Respondent: present

Respondent wishes to contest

Orders: B

Respondent to give the child to the complainant within 7 days and $15.00 a week interim maintenance w.e.f. today.

Adjourned 16/3/78 for mention only.

(Sgd.) A. M. Koya
Magistrate" C

It will be observed that two orders were made against the appellant; one for custody of "the child" and one for $15 a week interim maintenance.

On the 23rd February, 1978, the present solicitors for the appellant presented a petition of appeal to the Supreme Court against both orders and on the same day applied for and obtained from the same magistrate a stay of execution—the minute D does not state for how long. The magistrate's record of these proceedings was as follows:—

"23/2/78

A. Patel for Petition

Patel: E

This is an application for stay of execution. Section 5 of Maintenance and Affiliation Act 1971 Section 14 Interim. Must be some evidence before order made.

Refer to 9/76 *Supreme Court*

Section 29 of Maintenance and Affiliation. F
Re appeal against any order.

Court:

The application for stay of execution is granted."

The petition on appeal, which was signed by Mr. Ramrakha, for the petitioner (the present appellant) contained (inter alia) the following paragraphs: G

"2. That on his appearance as aforesaid Your Petitioner was closely questioned in some detail by the learned Magistrate and replied from the floor of the Court to his questions admitting that he lived with one Vijaya Singh but with the consent and concurrence of his wife, and otherwise denying the various allegations of being a habitual drunkard, desertion of his wife, wilful neglect to maintain and asking that the child of the marriage do continue to remain in H his custody.

.....

4. That Your Petitioner desires to appeal against the said order or orders on the following grounds:

(a) that the learned trial magistrate heard no evidence on oath from either party, and thereby was not entitled to make any order at all.

.....

.....

(d) the learned trial magistrate exhibited bias in law as he made an order without giving the Petitioner an opportunity to present his case, or to be heard, or to cross-examine the complainant, or any of her witnesses."

This petition calls for some comment. It purports to put evidence before the appellate court as to what transpired before the learned magistrate when the complaint came on for hearing. It is evidence not verified by the affidavit of any person, and signed on behalf of his client by counsel who was not present at the proceedings. It is obviously not a full statement of what was said—for example much more must have been said in relation to the child than that the appellant asked that it remain in his custody. Having regard to the fact that the main ground of appeal to the Supreme Court was that the learned magistrate heard no evidence "on oath" from either party is the possibility and even the likelihood excluded that the appellant made admissions as to his circumstances which would provide a basis for the learned magistrate to fix an interim maintenance order? There are accepted ways of remedying a deficient record—the concurrence of the magistrate could have been sought, or if agreement between the parties was not possible, resort could be had to an affidavit by a party, as counsel were not present.

The only other comment we wish to make on the petition in question is in relation to paragraph 4*(d)* set out above. The notes of the proceedings in the Supreme Court appeal do not indicate that any argument or authorities on bias in law were tendered. The paragraph as framed conveys the suggestion that the learned magistrate had refused the ordinary right of cross-examination to the appellant which is not the case. It appears to be superfluous as a ground of appeal, but if it is not, it could have been framed with more courtesy to give a truer picture of the facts.

In the Supreme Court the learned judge held that the learned magistrate had acted prematurely in making an order for the legal custody of the child. He said—

"Where a marital relationship is threatened as here, the interest of the child becomes one of paramount importance. Thus where the question of custody of the child is in issue it was incumbent upon the learned Magistrate to hear evidence on oath in regard to the allegations appearing in the complaint filed in Court and to obtain as much information as possible regarding the background of the contending parties to decide as to which of them would be more suitable to have custody of the child. From the record of proceedings it is clear that the learned Magistrate did not have sufficient material before him to do so when purporting to make an order for legal custody."

This question is not the subject of any further appeal and we are not therefore concerned with it. The appeal to this court asks that the order for interim maintenance be set aside and as originally presented, the single ground of appeal reads—

"Having regard to the Law, and all the circumstances of this case, the learned trial Magistrate was not entitled to make any interim order for maintenance whatsoever, unless and until he had heard the appellant on oath, and had carefully sifted his means and finances, and had arrived at the proper amount which would be due and payable, such amount not to exceed any final order that the learned trial Magistrate was to make in the circumstances."

During the argument Mr. Ramrakha resiled from his position that evidence on oath was absolutely essential and asked to substitute for the words "he had heard the appellant on oath" words such as "there was a hearing as to means".

The power to make an interim order for the payment of maintenance is contained in section 14 of the Maintenance and Affiliation Act, 1971, in Part 2 of the Act. It reads:

"14.—(1) Where, on the hearing of an application for an order of maintenance, such application is adjourned for any period exceeding seven days the court may order that the husband do pay to the wife or to an officer of the court or third person on her behalf, with effect from the date of service of the application a weekly sum not exceeding such an amount as might be ordered to be paid under a final order for the maintenance of the wife or any child or children in her custody until the final determination of the case.

Provided that no order directing such payment shall remain in operation for more than two months from the date on which it was made and any such order may be renewed from time to time until the final determination of the case.

(2) Any order made under the provisions of the last preceding subsection shall be enforceable in like manner as if it were a final order of the court."

There is no specific direction as to what material, beyond the existence of an application for maintenance, the court must have before it, to enable it to act under this section. In *Bould v. Bould* [1967] 2 All E.R. 1128 it was said of the equivalent section 6(1) of the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, (Imperial)—"The obvious intention of that paragraph is to provide for the wife's support during the time that a hearing stands adjourned for some substantial period". In England an interim order relating only to the payment of money is not subject to appeal—see section 6(2) of the same Act. In Fiji there is no such limitation in the matter of appeal.

It is plain that, before making such an order a magistrate must have some material before him. An application may be made at any stage of the proceedings when an adjournment becomes necessary—probably most frequently, and as in the present case, at the outset.

It is equally plain, in our opinion, and Mr. Ramrakha now concedes it, that the material is not necessarily evidence on oath. That may of course be or become necessary, according to what is in dispute, but there is no provision in the Act excluding other forms of evidence such as admissions made in or to the court itself. In section 10, which deals with desertion or departure to defeat the provisions of the Act, a magistrate must be satisfied "on oath". No such words appear in section 14, and we emphasise that we are dealing exclusively with that section. Section 9 is more general:

A "9. 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 words "on oath" do not appear there, though it can also be noted that the respondent described the appellant as her husband in her sworn complaint and he obviously did not contest the point.

B The effect of section 15(3) is permissive but it affords another illustration of material which is not sworn evidence. It reads:

"In any proceedings under this Part, the magistrate may direct a probation officer to conduct an investigation into the means of the parties to the proceedings and to report the result of this investigation to him, and the probation officer shall furnish a written report to the magistrate. A report under this sub-
C section may be received by the magistrate as evidence notwithstanding anything to the contrary in any enactment or rule of law relating to the admissibility of evidence, but copies of such report shall be furnished to the parties who shall have the right to call evidence in rebuttal of the matter contained therein."

In our opinion before he makes an interim order under section 14 a magistrate must hear the parties or at least they must have had notice and the opportunity of
D being present. The court will naturally be aware of what Park J., in a not entirely dissimilar context in *Robbins v. Robbins* [1970] 2 All E.R. 742 at 751, referred to as "the inherent right and duty of every court so to conduct its proceedings that justice may conveniently be done". As to the amount of material which a magistrate should look for before making an order that must depend on the particular circumstances, but Mr Ramrakha's strongest argument in this respect stems from the words of limita-
E tion in section 14(1) "a weekly sum not exceeding such an amount as might be ordered to be paid under a final order for.....maintenance". This, it is submitted, necessitates a full investigation so that the amount appropriate to a final order can be ascertained.

Having regard to the plain object of an interim order we are satisfied that this arithmetical interpretation, strictly applied, would defeat the object of the section.
F The final amount would frequently take time to ascertain and interim maintenance can be a matter of urgency and justice. We consider that the object of the limitation is sufficiently attained if magistrates interpret it as an injunction to be so conservative in their approach to an interim order as to eliminate real risk of its being excessive. To sum up, in our judgment a magistrate at the stage of an application for an interim order under section 14 and for the purposes of such order will give the parties an opportunity of being heard. The material which he may or should consider will vary
G according to the circumstances of the case but is not on this particular issue limited to evidence in the narrow sense of sworn evidence. Inter alia it may include facts agreed or admitted by the parties.

The remaining question is whether this appeal should, on these findings be allowed. We are satisfied that it should not. We have criticised the way in which the proceedings in the Magistrate's Court have been placed before the courts on appeal.
H Details are obviously lacking. It would be entirely wrong to assume that before he fixed the amount of the interim order for maintenance the learned magistrate did not enquire from the appellant as to his circumstances and employment. It would be

equally wrong to say that it was for the respondent to show this on the appeals. It was for the appellant to show that the order appealed against was wrongly made. A

The quantum of the interim maintenance order was varied by the learned judge in the Supreme Court. There is no reason to interfere with that order, which will stand.

The appeal is dismissed. Before leaving it we would point out that these appeals have set the litigation of the merits of the matter between the parties back some nine months. The second appeal in particular was in our opinion entirely unnecessary and the parties would have been better advised to have pressed on with the Magistrate's Court proceedings. B

Appeal dismissed.